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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a requirement that out-of-state civil defendants post a bond securing the judgment as a prerequisite to a state court's consideration of an appeal from a fully executable judgment is unconstitutional.

II. Whether due process prohibits a state court's exercise of personal jurisdiction based solely on an out-of-state defendant's placement of a telephone directory advertisement in the forum state.

III. Whether the $5 million punitive damages award against petitioner should be vacated and remanded for reconsideration in light of this Court's decision in *BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589 (1996).

PARTIES INVOLVED AND RULE 29.6 STATEMENT

In addition to the parties identified in the caption of the case, the following persons were parties in the court below: Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty. None of the parties in the court below or in this Court is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Keene Leavitt respectfully petitions this Court for a writ of certiorari to review a final order of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia, App., *infra*, 23a, is not reported. The judgment of the Circuit Court of Cabell County, West Virginia, App., *infra*, 1a-4a, also is not reported.

JURISDICTION

The order of the Supreme Court of West Virginia was entered on March 20, 1997. App., *infra*, 23a. On May 29, 1997, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 18, 1997. The jurisdiction of this Court is

invoked under 28 U.S.C. § 1257. The Attorney General of West Virginia has been notified of the challenge to the actions of the court below by service of a copy of this petition. *Cf.* 28 U.S.C. § 2403(b) and this Court's Rule 29.4(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Privileges and Immunities Clause of the United States Constitution (Art. IV, § 2, cl. 1) provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case arose out of the adoption of a child fathered by respondent John Woodruff Kessel. Petitioner Leavitt, a California adoption attorney, arranged the adoption on behalf of the child's mother, Anne Conaty. Mr. Kessel subsequently brought suit challenging acts related to the adoption. Following a jury trial in the Circuit Court of Cabell County, West Virginia, Mr. Leavitt was found liable for fraud and tortious interference with a parental relationship. He was or-

dered to pay $2 million in compensatory damages and $5 million in punitive damages. App., *infra*, 1a-4a. Although the judgment against Mr. Leavitt has at all times been fully executable, and Mr. Kessel has in fact attempted to enforce it in Virginia and California, the Supreme Court of Appeals of West Virginia dismissed Mr. Leavitt's appeal based on his refusal to post an "appeal bond" for $7 million (later reduced to $1.1 million). App., *infra*, 23a.

I. The Adoption Of Baby Boy Conaty

Anne Conaty and respondent Kessel, who both lived at the time in Huntington, West Virginia, had an on-again, off-again relationship for several years prior to 1990. Tr. 1841-42, 1987, 2004-08, 2034-35. Ms. Conaty learned that she was pregnant in November 1990, and she informed Mr. Kessel of her pregnancy on December 1, 1990. Tr. 2010, 2104. Ms. Conaty and Mr. Kessel were engaged to be married on December 31, 1990, but the engagement was called off in January 1991. Tr. 2022, 2028-30. Later that month, Ms. Conaty left West Virginia. Tr. 1138, 1579, 2040. At that time, she decided to have the baby and either raise it herself or place it for adoption. Tr. 1580.

For about three months, Ms. Conaty stayed with friends and family in Iowa, Tennessee, and North Carolina. Tr. 2041-42. In April 1991, Ms. Conaty was referred to petitioner Leavitt, a 1953 graduate of Stanford Law School who has concentrated on adoption law for most of his professional career. In May 1991, Ms. Conaty went to Minnesota to stay with a relative. Tr. 1619, 1873-74, 2048. While she was there, she decided to place the baby for adoption. Tr. 1619, 2056. She contacted Mr. Leavitt to arrange for the adoption on May 20, 1991. Tr. 1620, 2062. She moved to California for the final months of her pregnancy. Tr. 2064-65. On July 24, 1991, Ms. Conaty

gave birth in a Los Angeles hospital to a healthy baby boy. The following day, Ms. Conaty released custody of the baby to a married couple from Alberta, Canada who had agreed to adopt him.

II. The Adoption-Related Litigation

On June 3, 1991, Mr. Kessel filed an inverse paternity action in West Virginia state court. *Kessel* v. *Conaty*, No. 91-C-871 (Circuit Court of Cabell County, West Virginia). On June 26, the court issued an *ex parte* temporary injunction "prohibiting [Ms. Conaty] from placing her unborn child for adoption by anyone . . . until the paternity of [Mr. Kessel] can be established or refuted." PX 17. The effective date of service of the complaint, and thus the injunction, was July 26, 1991 (after the baby had been placed for adoption). PX 49. On August 6, 1991, Mr. Kessel's attorney telephoned Mr. Leavitt and informed him of the temporary injunction entered by the West Virginia court, and she sent a letter with a copy of the complaint and order the next day. Tr. 1013-14. On October 3, 1991, the West Virginia court entered a default judgment finding Mr. Kessel to be the father of Ms. Conaty's child. PX 49.

On November 26, 1991, Mr. Kessel filed an action in California state court seeking damages on various tort theories arising out of the placement of Ms. Conaty's baby for adoption. *Kessel* v. *Conaty et al.*, No. BC-043-140 (Superior Court of Los Angeles County, California). The action subsequently was dismissed at Mr. Kessel's request. Tr. 829.

On March 3, 1992, Mr. Kessel filed an action contesting the adoption of Ms. Conaty's baby in a Canadian court. After a hearing at which Mr. Kessel was represented, the court dismissed all of his claims, including his request for guardianship, and approved the

adoption. The Canadian court subsequently appointed the adopting couple as the sole guardians of the baby.

This case began in July 1992, when respondent Kessel sued Ms. Conaty, as well as her mother, her father, her brother, and Mr. Leavitt, in West Virginia state court for fraud and tortious interference with a parental relationship. The state-court jury returned a verdict for Mr. Kessel and awarded him $2 million in compensatory damages and $5.85 million in punitive damages. App., *infra*, 1a-4a. Mr. Leavitt is jointly liable for the full amount of compensatory damages, and is solely liable for $5 million of the punitive damages award.

III. The Underlying Appeal And The Imposition Of The "Appeal Bond" Requirement

Mr. Leavitt and the Conatys petitioned the West Virginia Supreme Court of Appeals for leave to appeal. In addition to a number of state-law contentions, including the fundamental objection that Mr. Kessel had failed to prove any cause of action under West Virginia law, they argued that the trial court had no personal jurisdiction over Mr. Leavitt, who had never been to West Virginia and had no jurisdictionally significant contacts with that State, and that the punitive damages were unconstitutionally excessive. The West Virginia Supreme Court of Appeals granted all of the defendants leave to appeal. App., *infra*, 13a-14a. Under West Virginia law, the acceptance of an appeal demonstrates that the appellate court "is of opinion that the decision complained of ought to be reviewed" and that the judgment is not "plainly right." W. Va. Code §§ 58-5-9 & 58-5-10.

On December 28, 1995, the trial court required Mr. Leavitt to post a $7 million bond to stay execution of the judgment against him. App., *infra*, 12a. The trial court did not require the Conatys, who disclosed their

assets and agreed not to dispose of them pending appeal, to post bond to stay the judgments against them.

Mr. Leavitt declined to post a supersedeas bond, leaving the judgment executable. Mr. Kessel therefore was free to use any remedies available to him to collect on the judgment obtained against Mr. Leavitt. And, in fact, Mr. Kessel attempted to execute against the judgment in Virginia, where some of Mr. Leavitt's assets are located. That effort was unsuccessful because, under Virginia law, Mr. Leavitt's assets in that State are exempt from attachment by judgment creditors.

Mr. Kessel also entered abstracts of judgment in the California counties in which Mr. Leavitt held property, creating liens against that property. Although Mr. Kessel entered the West Virginia judgment itself in a California court, that court rejected Mr. Kessel's attempt to levy against Mr. Leavitt's assets on the ground that the West Virginia judgment was void because the trial court lacked personal jurisdiction over Mr. Leavitt. *Kessel* v. *Leavitt*, No. SS-006-478 (Superior Court of Los Angeles County, California); *see* App., *infra*, 24a-27a. An appeal is pending in the California litigation.

Frustrated in his attempt to levy on Mr. Leavitt's assets in Virginia and California, Mr. Kessel asked the West Virginia Supreme Court of Appeals to condition Mr. Leavitt's appeal on the posting of a bond. On January 16, 1997, after leave to appeal had been granted and the briefs on the merits had been filed, that court ordered Mr. Leavitt to post a $7 million bond, warning that "[f]ailure to comply will result in the dismissal of appellant David Keene Leavitt's appeal in this Court." App., *infra*, 15a-16a. Mr. Leavitt filed a motion for reconsideration of the bond requirement, pointing out that it was unauthorized by statute or court rule and that it vastly exceeded Mr. Leavitt's financial resources, and specifically arguing that the imposition

of a bond under these circumstances violated his federal constitutional rights. The West Virginia Supreme Court of Appeals reduced the bond requirement to $1.1 million. App., *infra*, 19a-20a.

Mr. Leavitt again moved for reconsideration, stating that he could not afford to post the required bond and reiterating his arguments that the application of the bond requirement to him was both unauthorized and unconstitutional. Mr. Leavitt filed with the Supreme Court of Appeals a declaration listing all of his assets, as well as documents indicating that Mr. Kessel had filed liens against those assets in California, demonstrating that he could not afford to post a $1.1 million bond. The motion for reconsideration was denied. App., *infra*, 21a-22a.

On March 20, 1997, after all briefs had been filed and oral argument had been held on the merits of the appeal, the Supreme Court of Appeals of West Virginia dismissed Mr. Leavitt's appeal on the sole ground that he had failed to post a bond to appeal from a judgment that had never been stayed. App., *infra*, 23a. Although the Conaty defendants also did not post any bonds, the West Virginia Supreme Court of Appeals did not dismiss their appeals. That court has not yet issued a decision with respect to the challenges to the trial court judgment raised by the Conatys.

REASONS FOR GRANTING THE PETITION

Mr. Leavitt is a victim of a state civil justice system that is capriciously destroying litigants' constitutional rights. As a result of his helping an unmarried woman place her newborn baby for adoption, an event that took place entirely in California, Mr. Leavitt has been ordered to pay millions of dollars in compensatory and punitive damages by a West Virginia court that did not have personal jurisdiction over him for actions that

were not unlawful. For the following reasons, this Court should grant the petition for a writ of certiorari to review the unconstitutional judgment below.

I. A Requirement That A Civil Defendant Post A Bond As A Prerequisite To An Appeal From An Executable Judgment Is Unconstitutional

The Supreme Court of Appeals of West Virginia dismissed Mr. Leavitt's appeal without even considering the merits of his substantial constitutional and state-law challenges. That dismissal was based solely on the court's unwarranted and unauthorized requirement that Mr. Leavitt post an "appeal bond" to secure the judgment amount even though Mr. Leavitt has never sought a stay of the judgment against him and Mr. Kessel in fact initiated enforcement proceedings in the States where Mr. Leavitt's assets are located.[1] The "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals against Mr. Leavitt as a precondition to considering his appeal violated his rights

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[1] No West Virginia statute or rule authorizes the imposition of an "appeal bond" in these circumstances. West Virginia Rule of Appellate Procedure 6 allows the appellate court to condition a stay pending appeal on the filing of an appropriate bond. Mr. Leavitt did not obtain such a stay. West Virginia Code Section 58-5-14 allows the appellate court to require a bond to secure the judgment only "[i]f a supersedeas be awarded." No supersedeas was obtained in this case, and the courts of West Virginia have "no authority to prescribe or require additional conditions" of a bond. *State ex rel. Shenandoah Valley Nat'l Bank* v. *Hiett*, 32 S.E.2d 869, 874 (W. Va. 1945). Thus, the imposition of the "appeal bond" requirement against Mr. Leavitt was nothing other than an arbitrary and unjustified exercise of governmental power by the West Virginia Supreme Court of Appeals.

secured by the Due Process, Equal Protection, Commerce, and Privileges and Immunities Clauses.

A. Due Process Prohibits Requiring A Bond As A Prerequisite To An Appeal Of An Executable Judgment

Mr. Leavitt has never attempted to stay execution of the judgment against him, and Mr. Kessel has in fact attempted to levy against Mr. Leavitt's assets in Virginia and California. Yet the West Virginia Supreme Court of Appeals dismissed Mr. Leavitt's appeal for failure to post a bond securing the amount of the judgment against him.[2] That order conflicts with the well-established principle that "[a] party need not obtain a stay of judgment, nor file a supersedeas bond, in order to take or prosecute an appeal. *Failure to file such a bond is not grounds for dismissal of the appeal*, but simply removes the supersedeas aspect of the appeal and leaves the party who obtained the judgment free to execute on the judgment." 5 Am. Jur. 2d *Appellate Review* § 442 (1995) (footnotes omitted; emphasis added).

This Court expressly recognized more than 140 years ago that a litigant's failure to post a bond securing the judgment is not a basis for dismissing an appeal. *Hudgins* v. *Kemp*, 59 U.S. 530, 535 (1856) ("his omission to give the security . . . is no ground for dismissing the appeal"); *see also Ex parte French*, 100 U.S. 1, 5 (1879) (holding that a writ of error can be prosecuted even if the judgment under review is not

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[2] The original bond amount was $7 million, the entire amount of the judgment for which Mr. Leavitt is jointly and severally liable. The court later required Mr. Leavitt to post a $1.1 million bond, calculated as 55 percent (his proportionate fault as found by the jury) of the $2 million compensatory damages award.

superseded by the posting of a bond). It is an "elementary principle of appellate procedure, with which all would agree, that a review on the merits is not precluded by appellant's decision not to seek a stay of proceedings pending appeal by exercising his right not to file a supersedeas bond." *Tourville* v. *Tourville*, 185 N.W.2d 281, 282 (Minn. 1971). This principle has uniformly been followed by the courts of this Nation.[3] The first question presented is whether the West

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[3] *See, e.g., In re Farrell Lines, Inc.*, 761 F.2d 796 (D.C. Cir. 1985); *Grezaffi* v. *Smith*, 641 So. 2d 210, 215 (La. App. 1994); *Quintana* v. *Knowles*, 827 P.2d 97, 99 (N.M. 1992); *Younger* v. *Mitchell*, 777 P.2d 789, 792-93 (Kansas 1989); *Wells Fargo Credit Corp.* v. *Ziegler*, 780 P.2d 703, 706 (Okla. 1989); *Armstrong* v. *Armstrong*, 354 S.E.2d 350, 352 (N.C. App. 1987); *Hyman* v. *Leathers*, 308 S.E.2d 388, 390 (Ga. App. 1983); *Allers* v. *Willis*, 643 P.2d 592, 597 (Mont. 1982); *Mitchell* v. *Dexter Interiors*, 381 So. 2d 90, 91 (Ala. Civ. App. 1980); *Quillen* v. *Twin City Bank*, 485 S.W.2d 181, 183 (Ark. 1972); *Markel* v. *Transamerica Title Ins. Co.*, 442 P.2d 97, 106-07 (Ariz.), *cert. denied*, 393 U.S. 999 (1968); *Shulenberg* v. *Signatrol, Inc.*, 226 N.E.2d 624, 629 (Ill. 1967); *Berryman* v. *Ardery*, 398 S.W.2d 237, 238 (Ky. App. 1966); *Castilleja* v. *Camero*, 402 S.W.2d 272, 275 (Tex. Civ. App. 1966), *aff'd*, 414 S.W.2d 431 (Tex. 1967); *Horn* v. *Horn*, 73 So. 2d 905, 906 (Fla. 1954); *Monks* v. *Hemphill*, 203 P.2d 503, 503-04 (Colo. 1949); *Citizens Auto. Inter-Insurance Exch.* v. *Andrus*, 212 P.2d 406, 409 (Idaho 1949); *Bonde* v. *Stern*, 8 N.W.2d 457, 461 (N.D. 1943); *Ryan* v. *Plath*, 140 P.2d 968, 976 (Wash. 1943); *Tooker* v. *Missouri Power & Light Co.*, 80 S.W.2d 691, 693 (Mo. 1935); *Spring* v. *Spring*, 229 N.W. 147, 149 (Iowa 1930); *Patterson* v. *Old Dominion Trust Co.*, 140 S.E. 810, 813 (Va. App. 1927), *modified*, 141 S.E. 759 (Va. 1928); *Christenson* v. *Cudahy Packing Co.*, 257 P. 906, 906-07 (Cal. App. 1927); *Willey* v. *W.J. Hoggson Corp.*, 105 So. 126, 128 (Fla. 1925); *People ex rel. McKnight* v. *Chicago Title & Trust Co.*, 107 N.E. 198, 200 (Ill. 1914).

Virginia Supreme Court of Appeals violated Mr. Leavitt's constitutional rights by departing from this long-settled rule.

The Constitution does not *ipso jure* preclude individual States from establishing procedures that differ from the generally accepted norm. *Hurtado* v. *California*, 110 U.S. 516, 528-29 (1884). But this Court has made clear that a State's deviation from traditional procedures carries a presumption of unconstitutionality:

> [C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to the process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. *New Jersey*, 211 U.S. 78, 101 (1908).[4]

The Court has determined that the three-part inquiry outlined in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), is the appropriate standard by which to judge the constitutionality of a State's departure from established procedures in civil cases. *See*, *e.g.*, *Connecticut* v.

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[4] A challenge to a State's deviation from generally accepted procedures rarely will involve a direct conflict among judicial decisions because the courts in States following the traditional rule will have no reason to opine on the constitutionality of any other rule. This Court has not hesitated, however, to exercise its certiorari jurisdiction in such circumstances. For example, this Court recently concluded that Oregon's refusal to allow judicial review of punitive damages, which stood in marked contrast to the procedures applicable in all other States, warranted review and, indeed, violated due process. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

Doehr, 501 U.S. 1, 9-11 (1991); *id.* at 30-31 (Scalia, J., concurring). The factors relevant in determining whether the West Virginia Supreme Court of Appeals' aberrational bond requirement violated due process are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Consideration of these three elements demonstrates that the West Virginia court violated the Due Process Clause by ordering Mr. Leavitt to post a bond as a prerequisite to reviewing a fully executable judgment.

First, the private property interest at stake is "enormous." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting). Money is a core property interest. *Board of Regents* v. *Roth*, 408 U.S. 564, 571-72 (1972). Defendants in civil actions brought in West Virginia have an obvious and substantial interest in assuring that multimillion-dollar awards of damages, particularly punitive damages, are not erroneously assessed against them. *See Honda*, 512 U.S. at 434-35 ("A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment").

Second, requiring an "appeal bond" as a prerequisite to appellate review of an executable judgment creates a significant risk of erroneous deprivation. Although the Court has said that States are not constitutionally required to provide an appeal, *see*, *e.g.*, *District of Co-*

lumbia v. *Clawans*, 300 U.S. 617, 627 (1937), this Court repeatedly has stressed the constitutional importance of appellate review of punitive damages:

> In *Haslip*, the Court held that the common-law method of assessing punitive damages did not violate procedural due process. In so holding, the Court stressed the availability of *both* meaningful and adequate review by the trial court *and subsequent appellate review*. Similarly, in *TXO [Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993)], the plurality opinion found that the fact that the award was reviewed and upheld by the trial judge *and unanimously affirmed on appeal* gave rise to a strong presumption of validity.

Honda, 512 U.S. at 420-21 (emphasis added; internal quotation and citations omitted). The Court also has recognized the significance of appellate review of compensatory damages. *Gasperini* v. *Center for Humanities, Inc.*, 116 S. Ct. 2211, 2222-25 (1996).

The importance of appellate review of punitive damages was underscored by this Court's recent decision in *BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589 (1996), which established three "guideposts" to be applied by courts reviewing punitive damages awards. In *BMW* itself, on remand from this Court, the Supreme Court of Alabama remitted the $2,000,000 punitive damages award entered by the trial court to $50,000. *BMW of North America, Inc.* v. *Gore*, No. 1920324, 1997 WL 233910 (Ala. May 9, 1997). In the wake of *BMW*, appellate courts across the Nation have significantly reduced awards of punitive damages that had been affirmed by trial courts.[5] Yet the mul-

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[5] *See, e.g.*, *Kimzey* v. *Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (jury award of $50,000,000 remitted by trial

timillion-dollar punitive damages award against Mr. Leavitt has never been reviewed, by any court, in light of this Court's decision in *BMW*.

The "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals in this case precluded Mr. Leavitt from securing the benefits of appellate review and can be used to bar the courthouse doors to anyone else who is unable to post a multimillion-dollar bond as a precondition to appealing from an executable judgment. Such a requirement creates a substantial risk both of erroneous deprivation of property and of wrongful imposition of punishment. *Cf. Honda*, 512 U.S. at 432 ("Punitive damages pose an acute danger of arbitrary deprivation of property"). A recognized alternative—the time-honored rule that allows an appeal to proceed from an executable judgment without posting a bond—ameliorates that risk.

Third, the State of West Virginia or its courts would suffer no fiscal or administrative burdens if an "appeal bond" were not required as a prerequisite to an appeal from an executable judgment. The expenses associated with an appeal are secured by a separate "cost bond" posted by the appellant. *See Robertson* v. *Goldman*, 369 S.E.2d 888, 892 n.4 (W. Va. 1988) ("such bond is

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court to $5,000,000 and further remitted by appellate court to $350,000); *Lee* v. *Edwards*, 101 F.3d 805 (2d Cir. 1996) (remitting $200,000 punitive damages award to $75,000); *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996) (remitting $30,000,000 punitive damages award to $6,000,000), *cert. denied*, 117 S. Ct. 1846 (1997); *Foremost Ins. Co.* v. *Parham*, 693 So. 2d 409 (Ala. 1997) (remitting $3,000,000 punitive damages award to $60,500); *Shippen* v. *Parrott*, 553 N.W.2d 503 (S.D. 1996) (remitting $113,000 punitive damages award to $25,000).

posted to assure that costs are paid by an appellant who fails to prosecute the appeal with effect") (internal quotation omitted). Neither the State nor the courts of West Virginia stand to benefit from a separately posted "appeal bond," and therefore there is no governmental interest in requiring an appellant to post such a bond as a prerequisite to appealing from an executable judgment. And, to the extent the appellee's interests are relevant, an "appeal bond" is entirely unnecessary in the case of an executable judgment. *See Wright* v. *Fields*, 313 N.W.2d 902, 903 (Mich. 1981) ("There is no harm to the interest of the appellee in making the appeal bond only a condition of a stay of proceedings. If the appellant does not file a bond, the appellee may proceed to enforce the judgment.").

In short, the West Virginia Supreme Court of Appeals' requirement, which departs radically from traditional American practice, that an "appeal bond" must be posted before the court will entertain an appeal from a fully executable judgment creates an unjustified risk of erroneous and unlawful deprivation of the property of civil defendants and cannot withstand scrutiny under this Court's established due process jurisprudence.

B. The Imposition Of A Bond Requirement As A Prerequisite To Appealing An Executable Judgment Is Irreconcilable With This Court's Appeal Bond Precedents

The requirement that a litigant post an "appeal bond" to obtain appellate review of an executable judgment not only runs afoul of this Court's general due process jurisprudence, but also conflicts with *Lindsey* v. *Normet*, 405 U.S. 56 (1972), the Court's leading decision on appeal bonds. *Lindsey* involved Oregon's appellate scheme, under which an appellant was required to post a cost bond and, if the appellant elected to secure a stay of execution, a bond securing the

judgment. *Id.* at 74-75. West Virginia law imposes identical requirements. In *Lindsey*, the Court held unconstitutional Oregon's *additional* requirement that an appellant in a forcible entry and detainer action post a bond for twice the rental value of the premises.

The Court held that, although an appeal is not mandated by the Constitution, "[w]hen an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Id.* at 77. Oregon's additional bond requirement was unconstitutional under this standard because it did not serve any legitimate state objectives. The State's interest in protecting the appellee's property during the pendency of the appeal was fully served by the traditional bond requirements. *Id.* at 77-78. And the additional bond served to bar nonfrivolous appeals by those who could not afford it without discouraging meritless appeals by others who could afford it. *Id.* at 78.

Lindsey compels the conclusion that the West Virginia Supreme Court of Appeals' requirement that a litigant post a bond before appealing an executable judgment is unconstitutional. Mr. Leavitt has posted a bond for the costs on appeal. He has chosen to forgo a stay of execution and therefore was not required to post a bond securing the judgment. As in *Lindsey*, however, the court has unconstitutionally imposed an additional requirement applicable only to a narrow class of litigants.[6]

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[6] The class could be as broad as all litigants who appeal from executable judgments or as narrow as all litigants who reside out of state and appeal from executable judgments. The requirement does not apply to all litigants, however, as demonstrated by the fact that the Conatys have appealed from the judgments against them in this very case without being required to post any bond.

The *Lindsey* Court noted that "[w]e do not question here reasonable procedural provisions to safeguard litigated property, cf. *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37 (1954), or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and *if they are uniformly and nondiscriminatorily applied*." *Id.* at 78 (emphasis added). The fact that only Mr. Leavitt has been required to post an "appeal bond" before the West Virginia Supreme Court of Appeals will consider his appeal demonstrates that this requirement is *not* applied "uniformly and nondiscriminatorily." That is sufficient to render it unconstitutional.

Moreover, the State of West Virginia has no interest in "safeguarding" any property subject to execution by Mr. Kessel. To be sure, state courts have a legitimate interest in the enforcement of their judgments. But Mr. Kessel has attempted to enforce the West Virginia judgment in Virginia and California, where Mr. Leavitt's assets are located, and he continues to litigate the issue in California. Mr. Leavitt's assets have been identified and Mr. Kessel has filed abstracts of judgment against those assets in California. That he has been unsuccessful (thus far) in obtaining any money in Virginia or California is of no moment to the West Virginia courts, which do not have jurisdiction over Mr. Leavitt's assets.[7] A judgment debtor's successful

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[7] For this reason, the *National Union* case (cited by the Court in *Lindsey*) is inapposite. In *National Union*, the Court held that the dismissal of an appeal as a sanction for contempt of court did not violate due process. 348 U.S. at 43-44. The trial court order that was violated directed the defendant union to transfer assets from California to a receiver in Washington. The Court noted that there was no question as to the state courts' power to enter such an order. *Id.* at 41. Here, not only was there no order directing Mr.

defense of an execution proceeding in another State can no more justify an "appeal bond" requirement than could a judgment debtor's simple inability to pay the judgment.

This Court's observation in *Lindsey* regarding the discriminatory effect of requiring an additional bond is equally applicable here:

> For [those who cannot afford to post the bond], as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent . . . appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant . . . .

Id. at 79. Mr. Leavitt has a number of meritorious challenges to the judgment against him, as the West Virginia Supreme Court of Appeals recognized by granting him leave to appeal, yet that court has refused to consider his contentions solely because of an "appeal bond" requirement that Mr. Leavitt cannot afford to satisfy. Such an "arbitrary and irrational" requirement is unconstitutional. *Id.*[8]

Leavitt to transfer assets to West Virginia and, accordingly, no finding of contempt, there also was no authority to enter such an order.

[8] In addition to being irreconcilable with *Lindsey*, the order dismissing Mr. Leavitt's appeal for failure to post an "appeal bond" is at odds with numerous state and federal decisions holding, in a variety of circumstances, that the right of appeal cannot constitutionally be conditioned on a litigant's ability to post a bond. *See, e.g., Lecates* v. *Justice of the Peace Court*, 637 F.2d 898, 911 (3d Cir. 1980) (invalidating Delaware rule requiring surety bond as condition for appeal from a justice of the peace to a court of record); *Compton* v. *Naylor*, 392 F. Supp. 575, 577-78 (N.D. Tex. 1975) (three-judge court) (invalidating Texas rule requiring appellant to

C. The Bond Requirement Is Irreconcilable With This Court's Precedents Regarding Access To The Appellate Process

The West Virginia Supreme Court of Appeals' requirement that Mr. Leavitt post a multimillion-dollar bond, which he could not afford, before the court would consider his appeal cannot be reconciled with this Court's precedents holding unconstitutional unreasonable monetary limitations on access to appellate courts. Beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), this Court has held that States cannot require indigent defendants to pay for transcripts, or bear other costs, necessary to prosecute an appeal. As Justice Frankfurter explained in that case, "when a State deems it wise and just that convictions be susceptible to

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post bond for all damages, including attorneys' fees, incurred by appellee on appeal); *Blair* v. *Stump*, 617 P.2d 791, 793-96 (Ariz. App. 1980) (O'Connor, J.) (invalidating requirement that appellant post bond equal to twice yearly rental as condition to appealing from forcible entry and detainer judgment); *Merchants Ass'n* v. *Conger*, 606 P.2d 125, 126 (Mont. 1979) (invalidating requirement that appellant post undertaking for twice the judgment amount as a condition of appeal from justice court to district court); *Jack Spring, Inc.* v. *Little*, 280 N.E.2d 208, 211 (Ill. 1972) (invalidating requirement that appellant post bond as a prerequisite to appeal). In fact, this Court previously noted probable jurisdiction to review West Virginia's double-bond requirement for certain appeals "because it appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment," but remanded the case to the district court for reconsideration in light of an intervening state-court decision that cast doubt on the continuing importance of the question regarding the constitutionality of the bond requirement. *Patterson* v. *Warner*, 415 U.S. 303, 303 (1974) (per curiam).

review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted innocent persons, forsooth erroneously convicted, from securing such a review." *Id.* at 23 (opinion concurring in the judgment); *see also Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts").

The Court has also held that civil litigants are constitutionally entitled, at least under some circumstances, to access to the courts. *See Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Most recently, in *M.L.B.* v. *S.L.J.*, 117 S. Ct. 555 (1996), the Court held that a state requirement that an appellant pay some $2,000 in record preparation fees before hearing her appeal from a parental termination judgment violated the Constitution. *See also id.* at 570 (Kennedy, J., concurring in the judgment). Taken together, these cases rest, as Justice Black (who dissented in *Boddie*) recognized, "on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, *finance a bond*, risk a penalty, or afford to hire an attorney." *Meltzer* v. *C. Buck LeCraw & Co.*, 402 U.S. 954, 955 (1971) (opinion respecting the denial of certiorari) (emphasis added).

The unconstitutionality of West Virginia's "appeal bond" requirement follows *a fortiori* from these precedents. If a litigant against whom a $250 fine is imposed cannot be required to pay $300 for a transcript to obtain appellate review of his sentence, *Mayer* v. *Chicago*, 404 U.S. 189, 190 & n.1 (1971), then a liti-

gant who has been ordered to pay millions of dollars in punitive damages cannot be precluded from obtaining review by the imposition of a requirement that he post a multimillion-dollar bond that he cannot afford. The Due Process Clause protects property fully as much as the "liberty" interests that this Court found compelling in *M.L.B.* *See Zinermon* v. *Burch*, 494 U.S. 113, 132 (1990). The West Virginia Supreme Court of Appeals' requirement that Mr. Leavitt post a bond to secure appellate review of the executable judgment against him, particularly when other litigants have not been required to post any such bond, is unconstitutionally unreasonable and discriminatory.

D. Requiring Only Out-Of-State Defendants To Post A Bond As A Prerequisite To An Appeal Violates The Commerce Clause And The Privileges And Immunities Clause

While the "appeal bond" requirement offends traditional due process and equal protection principles, it also violates the Commerce Clause and the Privileges and Immunities Clause when, as in this case, it is applied only to out-of-state litigants. Mr. Leavitt and the four Conaty defendants presented a joint defense at trial, and the compensatory damages portion of the judgment is against all of them jointly and severally. Yet the West Virginia Supreme Court of Appeals did not require the Conatys, all of whom are West Virginia residents, to post any bond as a condition to appealing from the judgments against them (which have been stayed pending appeal).[9] The only defendant who was

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[9] The Conatys disclosed their assets to the trial court and agreed not to dissipate them, in exchange for which the trial court stayed the judgments against them. Mr. Leavitt never

required to post a bond was Mr. Leavitt, a California resident.

This Court invalidated a similarly discriminatory scheme in *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), which involved an Ohio statute of limitations that was automatically tolled in actions against out-of-state defendants. The Court observed that "[w]here a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce." *Id.* at 893. Because "the Ohio statute impose[d] a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations," it violated the Commerce Clause. *Id.* at 894.

The "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals, which apparently applies only against out-of-state defendants, is facially discriminatory. Moreover, it imposes a burden on interstate commerce—which the practice of law certainly is—by imposing differing obligations on California attorneys (such as Mr. Leavitt) and West Virginia attorneys (such as Ms. Conaty's brother Brian, who is a defendant in this case based in part on his ac-

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sought a stay of the judgment against him and, therefore, did not disclose his assets in the trial court. When Mr. Kessel raised this issue as a purported justification for the "appeal bond" required by the West Virginia Supreme Court of Appeals, Mr. Leavitt promptly disclosed his assets to that court. He had previously made the same disclosure to Mr. Kessel in the California litigation, as a result of which Mr. Kessel filed liens against Mr. Leavitt's properties.

tions as a lawyer). A State simply cannot, consistently with the Commerce Clause, establish different conditions on its appeal process for out-of-state as compared to in-state defendants.

Congruently, West Virginia effectively has denied to Mr. Leavitt a privilege—an appeal from a judgment—that the State has made available to its own citizens, the Conatys, through the differential imposition of the "appeal bond" requirement. Such preferential treatment of West Virginia citizens, to the detriment of the citizens of California who lose the valuable privilege of having multimillion-dollar judgments reviewed on appeal, cannot stand under the Privileges and Immunities Clause. *Cf. Angel* v. *Bullington*, 330 U.S. 183, 188-89 (1947). The Court has granted review of an analytically similar challenge to discriminatory state laws under the Privileges and Immunities Clause. *Lunding* v. *New York State Tax Appeals Tribunal*, *cert. granted*, 117 S. Ct. 1817 (1997) (No. 96-1462).

* * *

In sum, the West Virginia Supreme Court of Appeals has required Mr. Leavitt, but none of the other defendants in this case, to post an "appeal bond" before considering his appeal from the fully executable judgment against him. Intervention by this Court to reverse the unconstitutional action of the West Virginia Supreme Court of Appeals would clarify the rights of all litigants to equal, nondiscriminatory access to state judicial systems. A decision reversing the order of dismissal also would prevent state courts from refusing to consider federal questions on the basis of arbitrary and *ad hoc* procedural requirements, and would help to ensure that punishment is reserved only for deserving defendants.

The vast majority of tort cases, and punitive damages cases generally, are decided by state courts. *See BMW*, 116 S. Ct. at 1604 n.41; *id.* at 1616-17

(Ginsburg, J., dissenting). This Court should ensure that the state courts do so fairly, uniformly and consistently, and make clear that a court cannot refuse to consider a case on the basis of arbitrary and irrational limitations such as the "appeal bond" required by the West Virginia Supreme Court of Appeals in this case. As explained below, Mr. Leavitt has significant constitutional challenges to the judgment against him; this Court should not allow the West Virginia Supreme Court of Appeals to ignore those challenges by erecting an artificial and unconstitutional barrier to appellate review.[10]

II. The Due Process Clause Prohibits The Exercise Of Personal Jurisdiction Based Only On A Single Telephone Directory Advertisement

For one year (1991), Mr. Leavitt had a paid advertisement in the Huntington, West Virginia telephone directory. During that year, billing records indicate

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[10]A state-court order dismissing an appeal based on a litigant's failure to conform to state rules of practice sometimes will not support this Court's jurisdiction. *See, e.g., Hammerstein* v. *Superior Court*, 341 U.S. 491, 492 (1951); *Newman* v. *Gates*, 204 U.S. 89, 95 (1907). As noted above, however, the dismissal of Mr. Leavitt's appeal was not authorized under West Virginia law. In any event, even if the West Virginia Supreme Court of Appeals' orders could be construed as implicitly concluding that the court had such authority, it is well-established that this Court has jurisdiction to review dismissal orders if the state court's refusal to accept an appeal in and of itself raises a federal constitutional issue. *Burns* v. *Ohio*, 360 U.S. 252, 256-58 (1959). The sole ground for dismissal in this case was Mr. Leavitt's inability to comply with the "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals, which, as demonstrated above, was unconstitutional. The Court therefore has jurisdiction to review the decision below.

that several telephone calls were made from West Virginia to Mr. Leavitt's 800 number, primarily from unknown callers. Mr. Leavitt has never had a client from West Virginia. Ms. Conaty, who had left West Virginia prior to retaining Mr. Leavitt, did not contact Mr. Leavitt as a result of the yellow pages advertisement, but rather was referred to him by another California adoption lawyer. Mr. Leavitt is not licensed to practice law in West Virginia and, prior to this lawsuit, had never even been to West Virginia.

The trial court in this case concluded that Mr. Leavitt's yellow pages advertisement was a sufficient basis to support a finding of personal jurisdiction under both West Virginia's long-arm statute and the Due Process Clause. Tr. 2869. The Superior Court of Los Angeles County, California, disagreed, concluding that Mr. Leavitt had insufficient contacts with West Virginia, and therefore that the courts of that State could not constitutionally exercise personal jurisdiction over him. App., *infra*, 24a-27a.

The judgment below cannot be reconciled with this Court's decision in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984), in which the Court held that the Texas courts could not exercise jurisdiction over a foreign corporation because the company had insufficient contact with Texas. Although the contacts in *Helicopteros* were far more extensive than Mr. Leavitt's contacts with West Virginia, the Court held that they did not constitute the "continuous and systematic general business contacts" sufficient to satisfy the requirements of the Due Process Clause. *Id.* at 416. To the extent that a State may ever constitutionally exercise jurisdiction over an absent individual defendant, *cf. Burnham* v. *Superior Court*, 495 U.S. 604, 610 n.1 (1990) (plurality opinion), it necessarily follows from *Helicopteros* that Mr. Leavitt's limited and sporadic contacts with West Vir-

ginia cannot, as a matter of due process, support the exercise of personal jurisdiction over him by the courts of that State.

The relationship between advertising and personal jurisdiction is a question of great importance. This Court has held that attorneys (and other professionals) have a constitutional right to advertise their services. *See, e.g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982). But the courts of this Nation are sharply divided regarding the question whether the placement of a single such advertisement, or the receipt of a few telephone calls as a result, can subject a defendant to personal jurisdiction in each forum in which the advertisement might circulate. *Compare Cubbage* v. *Merchent*, 744 F.2d 665, 668-69 (9th Cir. 1984) ("a telephone listing, without further solicitation, is not enough in itself to confer jurisdiction"), *cert. denied*, 470 U.S. 1005 (1985), *with Siskind* v. *Villa Foundation for Educ., Inc.*, 642 S.W.2d 434, 436 (Tex. 1982) ("[The defendant's] decision to advertise in Texas telephone directories, in and of itself, is a sufficiently purposeful act that is done in Texas" to support personal jurisdiction).[11] This case, in which

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[11] *Compare also, e.g., Charlie Fowler Evangelistic Ass'n* v. *Cessna Aircraft Co.*, 911 F.2d 1564, 1565-66 (11th Cir. 1990) (listing in regional telephone directory insufficient contact); *Van Pelt* v. *Best Workover, Inc.*, 798 S.W.2d 14, 17 (Tex. App. 1990) (telephone listing insufficient contact); *Munley* v. *District Court*, 761 P.2d 414, 415-16 (Nev. 1988) (yellow pages listing, newspaper advertisement, billboards and distribution of brochures insufficient contacts); *Kennedy* v. *Ziesmann*, 526 F. Supp. 1328, 1331 (E.D. Ky. 1981) (listing in telephone directory insufficient contact); *Circus Circus Hotels, Inc.* v. *Superior Court*, 120 Cal. App. 3d 546, 566-67 (1981) (newspaper advertisements and 800 number insufficient contacts); *Scheidt* v. *Young*, 389 F.2d

two different courts have reached conflicting conclusions on the same facts, presents an opportunity for this Court to resolve this conflict and to clarify the constitutional limitations on the States' exercise of personal jurisdiction based on advertising activities.

III. The Judgment Should Be Vacated, And The Case Remanded, For Consideration Of The Punitive Damages Award In Light Of *BMW*

This Court recently held, as a matter of constitutional law, that "a State may not impose economic sanctions [*i.e.*, punitive damages] on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW*, 116 S. Ct. at 1597. Mr. Leavitt's conduct was entirely lawful in California, where it took place. Under our federal structure, West Virginia simply "does not have the power . . . to punish [Mr. Leavitt] for conduct that was lawful where it occurred . . ." by requiring him to pay punitive damages for engaging in that conduct. *Id.* This Court's holding in *BMW*, which was announced after the trial court entered judgment in this case, that punitive damages may not be predicated on conduct that

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58, 60 (3d Cir. 1968) (newspaper advertisement including telephone number insufficient contact), *with, e.g.*, *Balloon Bouquets, Inc.* v. *Balloon Telegram Delivery, Inc.*, 466 N.E.2d 523, 524-25 (Mass. App. 1984) (telephone directory listing, 800 number and solicitations sufficient contacts); *Parris* v. *Garner Commercial Disposal, Inc.*, 253 S.E.2d 29, 34 (N.C. App. 1979) (telephone directory listing, 800 number and correspondence sufficient contacts); *Gregory* v. *Grove*, 547 P.2d 381, 383 (Okla. 1976) (telephone directory listing and correspondence sufficient contacts); *Hull* v. *Gamblin*, 241 A.2d 739, 743 (D.C. App. 1968) (telephone directory listing sufficient contact).

was lawful where it occurred compels the conclusion that the punitive damages award against Mr. Leavitt cannot stand.

The Constitution requires that the punitive damages award against Mr. Leavitt be vacated for a second, and independent, reason. The basis for that award was Mr. Leavitt's alleged interference with Mr. Kessel's parental rights. But until the verdict was announced in this case, such interference was not tortious in West Virginia. As this Court has recognized, "[r]etroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf* v. *USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994). That is because "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW*, 116 S. Ct. at 1598. Because Mr. Leavitt had no notice that his placement of Ms. Conaty's child for adoption could subject him to any punishment in West Virginia, let alone the imposition of a multimillion-dollar punitive damages award, that award violates due process.

Finally, even if *some* punitive damages could be justified in this case, the $5 million award against Mr. Leavitt is unconstitutionally excessive. As this Court has admonished, "[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award." *Id.* at 1601. The Court explained in *BMW* that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 1599. Mr. Leavitt's involvement in the Conaty adoption, which was entirely lawful in California and was approved by a Canadian court, is

not the kind of outrageous behavior that constitutionally can support a multimillion-dollar award of punitive damages.

This Court has not hesitated, in the wake of *BMW*, to grant certiorari, vacate the judgment below, and remand punitive damages cases for reconsideration in light of the principles articulated in that case. *See, e.g., Life Ins. Co. of Georgia* v. *Johnson*, 117 S. Ct. 288 (1996); *OXY USA Inc.* v. *Continental Trend Resources, Inc.*, 116 S. Ct. 1843 (1996); *Ford Motor Co.* v. *Sperau*, 116 S. Ct. 1843 (1996); *Combustion Energy, Inc.* v. *Johanssen*, 116 S. Ct. 1843 (1996); *Apache Corp.* v. *Moore*, 116 S. Ct. 1843 (1996). Because the punitive damages award against Mr. Leavitt has never been reviewed under *BMW*, and has never been reviewed by any appellate court, the same treatment is warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Appendix

APPENDIX

Judgment Order in *Kessel* v. *Leavitt et al.*, No. 92-C-2141 (Circuit Court of Cabell County, West Virginia, Dec. 7, 1995)..... 1a
Order Denying Motion for New Trial (Dec. 28, 1995)..... 5a
Order Denying Motion to Alter or Amend Judgment (Dec. 28, 1995) 6a
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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

JUDGMENT ORDER

This action came on for trial on November 13, 1995, before the Court and a jury, Honorable O.C. Spaulding presiding, and the issues having been duly tried and after having maturely deliberated on December 4, 1995, the jury returned its answers to the interrogatories propounded by the Court and its verdict as follows:

INTERROGATORIES

Jury, please answer the following questions:

1. Do you believe by a preponderance of the evidence that Anne Conaty personally knew when she placed Baby Boy Conaty with the Holmstroms that the Circuit Court of Cabell County had entered an order prohibiting her from placing the child for adoption?

Yes X No

Gary D. Berry
Foreperson

2. Do you believe by a preponderance of the evidence that David Leavitt personally knew when Anne Conaty placed Baby Boy Conaty with the Holmstroms that the Circuit Court of Cabell County had entered an order prohibiting her from placing the child for adoption?

Yes X No

Gary D. Berry

Foreperson

JURY VERDICT FORM

The jury is to find for the plaintiff or the defendants. If you find for the plaintiff, you should fill out Part I. If your verdict is for the defendants, then fill out part II.

I. Verdict for Plaintiff

We, the jury, find our verdict for the plaintiff and against the defendant or defendants as set forth below:

A. Liability

1. Fraud Cause of Action

We, the jury, find for the plaintiff and against the following defendants on the fraud cause of action and assess their percent fault as follows:

David Leavitt	55%
Brian Conaty	25%
Anne Conaty Selvaggi	10%
Dr. Thomas Conaty	5%
Eleanor Conaty	5%
Total (total must equal 100%)	100%

2. Tortious Interference Cause of Action

We, the jury, find for the plaintiff and against the following defendants on the tortious interference cause of action and assess their percent fault as follows:

David Leavitt	35%
Brian Conaty	25%
Anne Conaty Selvaggi	30%
Dr. Thomas Conaty	2%
Eleanor Conaty	8%
Total (total must equal 100%)	100%

B. Compensatory Damages

We, the jury, find the damages that the plaintiff has suffered are as follows and we assess damages as follows:

1. The reasonable costs and expenses John Kessel expended in legal fees, investigator fees and other fees in his attempt to locate the child and gain custody of him:

$ 150,000

2. Any mental pain and suffering, anguish and anxiety that plaintiff has undergone to date as a proximate result of the defendants' conduct:

$ 500,000

3. John Kessel's loss of the solace, society, companionship and services of the child that were proximately caused by the conduct of the defendants:

$1,000,000

4. If you believe with reasonable certainty that John Kessel will suffer mental pain and suffering, anguish or anxiety in the future, then future mental pain and suffering, anguish or anxiety may be taken into consideration and you may award an amount to compensate plaintiff for said elements:

$ 350,000

C. Punitive Damages

We, the jury, find and assess punitive damages against the following defendants and in the following amounts:

David Leavitt	$5,000,000
Brian Conaty	$ 500,000
Anne Conaty Selvaggi	$ 250,000
Dr. Thomas Conaty	$ 50,000
Eleanor Conaty	$ 50,000

Gary D. Berry
Foreperson

And the jury on December 4, 1995, rendered its verdict for the plaintiff to recover of the defendants damages in the amounts as set forth above.

It is accordingly ADJUDGED, ORDERED and DECREED that plaintiff recover from the defendants, jointly and severally, the sum of $150,000 with interest

thereon at the rate of 10% per annum from June 1, 1992, until paid and $1,850,000 with interest at the rate of 10% per annum thereon from December 4, 1995, until paid and his costs of this action as compensatory damages.

And the jury having found punitive damages, it is further ADJUDGED, ORDERED and DECREED that plaintiff recover from David Leavitt the sum of $5,000,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; from Brian Conaty the sum of $500,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; from Anne Conaty Selvaggi the sum of $250,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; from Dr. Thomas Conaty the sum of $50,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; and from Eleanor Conaty the sum of $50,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid as punitive damages.

Dated this 7th day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: DEFENDANTS' MOTION FOR NEW TRIAL)

On the 27th day of December, 1995, came the parties by their respective counsel on defendants' motion for new trial. The Court, having heard the argument of counsel and having reviewed the motion of the defendants, finds that the motion for new trial should be denied for the reasons as previously set forth on the record of this case as well as for the reasons stated on the record at the hearing on said motion.

It is accordingly ADJUDGED, ORDERED and DECREED that the defendants' motion for new trial be and the same is hereby denied, to which ruling the defendants object.

Dated this 28th day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT)

On the 27th day of December, 1995, came the parties by their respective counsel on defendants' motion to alter or amend judgment. The Court, after considering the motion and the grounds therefore and after having heard the argument of counsel, finds for the reasons set forth on the record at the hearing that the compensatory damages be amended with respect to the $150,000.00 award made for costs expended from $150,000.00 to $116,687.47. In all other respects the compensatory damages are found to be supported by the evidence and the same are not excessive as a matter of law or fact.

Thereupon the Court took up the question of punitive damages and upon full and complete review of same based upon the evidence offered at the trial of this case, the Court finds that punitive damages were appropriate as awarded. The Court further finds that the same were not excessive and that said awards were appropriate under the law of the State of West Virginia based upon the evidence in this case.

It is accordingly ADJUDGED, ORDERED and DECREED that the verdict and judgment in this case

be amended by substituting the sum of $116,687.47 for the sum of $150,000.00 which was the compensation for the costs expended by the plaintiff in this matter. Plaintiff objects to this inasmuch as the plaintiff contends that the verdict was supported by the evidence in this respect.

It is further ADJUDGED, ORDERED and DECREED that in all other respects the defendants' motion to amend or alter the judgment in this case with respect to compensatory damages be and the same is hereby denied. The defendant objects to t his ruling.

It is further ADJUDGED, ORDERED and DECREED that the defendants' motion to amend or alter the punitive damages in this case be and the same is hereby denied, all of the above pursuant to the rulings made by this Court of record in this matter. The defendant objects to the rulings of the Court.

Dated this 28th day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: DEFENDANTS' MOTION TO REVIEW PUNITIVE DAMAGES AWARD)

On the 27th day of December, 1995, came the parties by their respective counsel on defendants' motion for the Court to conduct a judicial review of the punitive damages made by the jury in this matter pursuant to Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991). Whereupon the Court undertook to review said motion and to consider the arguments of counsel in regard to said motion. The Court, after reviewing the punitive damages award, finds for the reasons noted on the record, that the same is appropriate pursuant to the rulings of Garnes v. Fleming Landfill, Inc. and that said award meets all the criteria established by the Supreme Court of the State of West Virginia for an award of punitive damages by a jury in this State.

It is accordingly ADJUDGED, ORDERED and DECREED that the defendants' motion to strike said punitive damage award be and the same is hereby denied for the reasons set forth on the record of this case. The defendants object to said ruling.

Dated this 28th day of December, 1985.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: MOTION FOR STAY OF JUDGMENT)

On the 27th day of December, 1995, came the parties by their respective counsel for further hearing on the issue of whether the execution on the judgment heretofore rendered in this case should be stayed pending appeal and for the determination of the bond or other security which should be provided to secure the aforesaid judgment pending appeal in this matter, which said hearing had been held on the 22nd of December, 1995. Whereupon the Court received three exhibits represented to be the financial condition of the defendants Thomas and Eleanor Conaty, Brian Conaty and Anne Conaty which said exhibits were defendants' representations of their assets. No information was provided to the Court by defendant David Leavitt.

Whereupon the Court undertook to hear the arguments of counsel and the evidence presented by the parties with respect to the setting of bond. The Court first considered the bond or security which should be provided by the Conaty defendants pursuant to their motion to stay the enforcement of the judgment.

Whereupon the said defendants, by counsel, offered the following as an alternative to or in lieu of bond:

1. The Conaty defendants will retain and not dispose of any assets that they may own pending appeal of this matter, and if the appeal is denied, pending satisfaction of the judgment, interest and costs in this action;

2. Within ten days from December 27, 1995, the Conaty defendants will provide verified lists of all assets, tangible and intangible, real and personal, which they own in whole or in part, anywhere including any state in the United States or in any other country. This information will be provided to plaintiff on a form as provided and required by the U.S. Bankruptcy Court for the listing of assets, the same as if it would be subject to a bankruptcy proceeding;

3. The Conaty defendants will make themselves available pursuant to the West Virginia Rules of Civil Procedure for questioning by deposition, interrogatory or request for documents in aid of execution for discovery of their assets; and

4. The defendants will cause any financial institution, corporation or person who may hold any asset of defendants, in whole or in part, to execute and provide to plaintiff an agreement that said assets will be held for the benefit of satisfaction of said judgment in the event that the appeal that the defendants intend to prosecute is not successful.

The plaintiff in this matter has requested that bond be required of the defendants to provide security bond for the entire amount of the judgment. The Court, however, finds in its discretion that in lieu of bond the defendants may provide security in the manner as heretofore offered by them as long as they comply with the Court's requirements which are as follows:

It his hereby ADJUDGED, ORDERED and DECREED that the judgment in effect in this case by

[*sic*] stayed so long, and only so long, as the following requirements are met:

1. Thomas Conaty, Eleanor Conaty, Brian Conaty and Anne Conaty shall, within ten days of December 27, 1995, provide individual affidavits which shall set forth all of their assets, tangible and intangible, real and personal, on a form which includes all those matters which are required by the U.S. Bankruptcy Court for persons who are applying for bankruptcy. The aforesaid information shall remain confidential and shall be used only for purposes of this proceeding;

2. Said defendants shall make themselves available for depositions pursuant to the West Virginia Rules of Civil Procedure, and in addition, they shall comply with the West Virginia Rules of Civil Procedure for interrogatory and request for documents. The time period for such shall be reduced to a response time of tend days of service of notice on their counsel;

3. Within ten days of December 27, 1995, said defendants shall cause to be signed by any financial institution, any corporation or any person who holds assets for or on behalf of said defendants, in whole or in part, that they will hold and retain and not dispose of or waste said assets pending the outcome of this appeal. Should said appeal be denied or the judgment be affirmed, said assets would be available and paid over to the plaintiff in this matter for satisfaction of the judgment, interest and costs of this proceeding; and

4. Pending the outcome of the appeal, the income from said assets as represented to the Court and in the amounts as represented to the Court as being the income shall be paid over to defendants Eleanor and Tom Conaty for their living expenses pending appeal. However, the Conaty defendants shall not dispose of or waste any asset or property of any nature or kind.

It is further ORDERED that should the information provided by the Conaty defendants not be accurate or

should they not cooperate as required by their agreement and as by the order of the Court, that the plaintiff may reapply to the Court by motion for bond to be required by said defendants.

Whereupon the Court considered bond for defendant David Leavitt. It appearing to the Court that no evidence had been offered by said defendant Leavitt of his financial condition, and although his counsel had made representations as to his approximate worth, no financial statement was provided and no offer was made by said defendant to provide security by bond or otherwise at the hearing on this date. The Court, after considering the evidence in this case and after considering the judgment and the situation of the parties, particularly that the defendant has no assets in the State of West Virginia, that he is not a resident of the State of West Virginia, that he has made no offer in any way to provide security for the judgment, it is ADJUDGED, ORDERED and DECREED that the stay of the execution of the judgment in this matter be granted to said defendant David Keene Leavitt upon posting with the Circuit Court of Cabell County good and sufficient bond in the amount of Seven Million Dollars to satisfy the judgment, interest and costs in this proceeding.

Dated this 28 day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of June, 1996, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, May 3, 1996, came the petitioners, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Cabell County, rendered on the 28th day of December, 1995, with the record accompanying the petition. Thereafter, on the 19th day of June, 1996, came the respondents, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal. It is hereby ordered that this proceeding be submitted, heard and determined upon the original record, typewritten briefs and oral argument if requested by the parties. It is further ordered that the appellants file an original and nine copies of a brief on or before the 5th

day of August, 1996; the appellees to file a like number of briefs on or before the 5th day of September, 1996; and any reply brief deemed necessary to be filed on or before the 21st day of September, 1996.

A True Copy

Attest: /s/ Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th day of January, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to wit, January 14, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their motion in writing for leave to file a response to the appellants' reply brief and further, requesting this Court to require the posting of a bond by appellant David Keene Leavitt during the pendency of this appeal, for the reasons stated therein. Thereafter, on the 16th day of January, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion for leave to file a response to the reply brief of the appellants. However, the motion requesting the posting of a bond by appellant David Keene Leavitt is hereby granted. It is therefore ordered that appellant David Keene Leavitt

post a bond in the amount of Seven Million Dollars ($7,000,000.00) in the Circuit Court of Cabell County, with good security to be approved by the Clerk of the Circuit Court of Cabell County, and conditioned according to law, said bond to be posted within ten days following the date of this order. Failure to comply will result in the dismissal of appellant David Keene Leavitt's appeal in this Court.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, January 21, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their motion in writing requesting reconsideration of this Court's order entered on the 16th day of January, 1997, requiring appellant David Keene Leavitt to post a bond within ten days in the Circuit Court of Cabell County in the amount of Seven Million Dollars ($7,000,000.00), for the reasons stated therein. Thereafter, on the 22nd day of January, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the 23rd day of January, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Sim-

mons, their attorneys, and presented to the Court their written reply thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby stay the aforesaid order of this Court entered on the 16th day of January, 1997, requiring the posting of a bond by appellant David Keene Leavitt in the amount of Seven Million Dollars ($7,000,000.00), until further order of this Court.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of February, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, January 21, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their motion in writing requesting reconsidering of this Court's order entered on the 16th day of January, 1997, requiring appellant David Keene Leavitt to post a bond within ten days in the Circuit Court of Cabell County in the amount of Seven Million Dollars ($7,000,000.00), for the reasons stated therein. Thereafter, on the 22nd day of January, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the 23rd day of January, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Sim-

mons, their attorneys, and presented to the Court their written reply thereto.

Upon consideration whereof, on the 24th day of January, 1997, the Court stayed its order entered on the 16th day of January, 1997.

On this day came the Court and proceeded to reconsider its order entered on the 16th day of January, 1997, amending said order only insofar it relates to the amount of the required bond. It is therefore ordered that the amount of the bond required to be posted by appellant David Keene Leavitt in the Circuit Court of Cabell County be, and it hereby is, reduced from Seven Million Dollars ($7,000,000.00), to One Million One Hundred Thousand Dollars ($1,100,000.00), representing 55%, or the maximum percentage of comparative fault attributed to such defendant, of the compensatory damages found by the jury below. It is further ordered that the aforesaid bond be posted by appellant David Keene Leavitt in the Circuit Court of Cabell County, and conditioned according to law.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of February, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, February 11, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their motion in writing requesting this Court to vacate and/or reconsider or stay its order entered on the 6th day of February, 1997, wherein the Court reduced the bond required by this Court to be posted in the above-captioned proceeding, to One Million One Hundred Thousand Dollars ($1,100,000.00) from Seven Million Dollars ($7,000,000.00), for the reasons stated therein. Thereafter, on the 18th day of February, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion.

A True Copy
Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of March, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, March 11, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their motion in writing to dismiss appellant David Keene Leavitt from the above-captioned appeal for the reasons stated therein, which being seen and inspected by the Court is hereby granted. It is therefore ordered that appellant David Keene Leavitt be, and he hereby is, dismissed from the above-captioned proceeding.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff,

v. No. SS 006 478

DAVID KEENE LEAVITT, Defendant.

TRANSCRIPT OF PROCEEDINGS
November 4, 1996
[Excerpts]

* * *

THE COURT: . . . I find the Defendant Leavitt is entitled to a ruling on his motion to vacate entry in California of the West Virginia judgment.

* * *

One, the first legal principle that I find applicable is that the West Virginia judgment is not entitled to res judicata under West Virginia law, since the judgment is on appeal in West Virginia. And ample authority has been cited by the moving party to support that proposition.

The fact that West Virginia law provides and allows for enforcement while a matter is on appeal in that state, does not somehow provide for a res judicata effect. In other words, the West Virginia judgment is not final. And it is clear from the cases cited that California is obligated to give full faith and credit only if the West Virginia judgment is final.

The third legal principle that has been established, to my satisfaction, is that 1710.40 CCP does allow a Defendant to litigate the issue of whether West Virginia had personam, or personal jurisdiction, over a litigant. In this case, over Defendant Leavitt.

It's clear from the cases cited, amongst which are Brinker, and I'm going to avoid giving the specific citations at this point, these are all California cases. The Commercial Bank case, the Worldwide Imports cases all support that proposition. And if that weren't enough, the comment -- and I think I made reference to this last time. I'm not sure. The law review comment to 1710.40 clearly indicates that one of the defenses to an effort to provide full faith and credit for a foreign state's judgment, is the lack of personal jurisdiction.

* * *

I find that the evidence that I have considered establishes that the West Virginia Court lacked personal jurisdiction over Defendant Leavitt.

The evidence that has been presented to me is insufficient to establish either general jurisdiction or specific jurisdiction over Defendant Leavitt. There's an insufficient showing of the required minimum contacts by Leavitt within the State of Virginia [*sic*], and the requisite nexus between the alleged tortious conduct for which the West Virginia Court imposed liability, and the State of West Virginia.

There's been no showing by Plaintiff, notwithstanding that Leavitt advertised in an 800 directory, or for that matter, that the Yellow Page listing, and I believe it was in the year '91, in Cabel [*sic*] County, West Virginia, does not demonstrate a purposeful availment (sic) by Leavitt of the benefits and/or protection of the West Virginia jurisdiction.

There's an insufficient showing of a physical presence by the Defendant Leavitt in the State of Virginia [*sic*], and an insufficient showing of any acts, tortious or otherwise, performed in West Virginia by Leavitt.

In essence, in order to . . . grant the motion to vacate, [I] find that the exercise of personal jurisdiction over Defendant Leavitt, is violative of the due process rights of Leavitt, and violative of the due process

clause of the U.S. Constitution, and that the exercise of personal jurisdiction by West Virginia over Leavitt, given the facts that have been established, is not fair and reasonable.

* * *

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff,

v. No. SS 006 478

DAVID KEENE LEAVITT, Defendant.

ORDER VACATING JUDGMENT

The Motion for Reconsideration of Defendant DAVID KEENE LEAVITT was heard on November 4, 1996 in Department "J" before the Honorable Alan B. Haber, Judge of the Superior Court; Brian L. Dobrin and Deborah R. Bronner of Dobrin & Bronner appeared on behalf of Plaintiff JOHN WOODRUFF KESSEL and Larry R. Feldman and Robert M. Turner of Fogel, Feldman, Ostrof, Ringler & Klevens, A Law Corporation, appeared on behalf of Defendant DAVID KEENE LEAVITT; having considered the papers filed by the parties, and the Court's file herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the Motion for Reconsideration filed by Defendant is granted and the Judgment entered on March 6, 1996 in this action is hereby vacated on the grounds that the Circuit Court of Cabell County did not have personal jurisdiction of Defendant DAVID KEENE LEAVITT when it entered the Sister State Judgment (upon which the Judgment in this action is based) in an action entitled Kessel v. Leavitt, et al., which is designated as Case No. 92-C-2141 in the files and records of the Circuit Court of Cabell County.

DATED: Nov 05 1996
/s/ Judge Alan B. Haber

Supreme Court, U. S.
FILED
AUG 18 1997
CLERK

No. 97-124

In The

Supreme Court of the United States

October Term, 1996

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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Counsel of Record

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully petitions this Court to deny petitioner's writ of certiorari to review a final order of the Supreme Court of Appeals of West Virginia.

STATEMENT

Your respondent, John Kessel, takes exception to the statement of facts outlined by the petitioner. The petitioner designed the very dilemma of which he complains. As is set out more fully below, petitioner made no effort to provide any security for the judgment, made conflicting representations to the West Virginia trial court about his ability to post bond, refused to provide the West Virginia court with any evidence of his assets or subject himself to examination for discovery of the same, never requested from the West Virginia court a reduction in bond, resisted enforcement action in California and refused to post a $2 million bond required in California, while at the same time transferring his California assets to others to avoid subjection of the assets to the judgment. While appealing the judgment to the West Virginia Supreme Court, he obtained a California trial court ruling vacating the West Virginia judgment and dismissing respondent's fraudulent transfer action. When the West Virginia Court dismissed petitioner's appeal pursuant to West Virginia's statutes and rules, respondent had no security for the judgment being appealed while petitioner had been given four opportunities to provide an alternative to the dismissal of his appeal. His only response was

to claim the West Virginia Supreme Court lacked the authority to require bond as a condition of an appeal. Obviously, the petitioner adopted a legal strategy of never posting bond of any kind or any amount in West Virginia while attempting to insulate his assets from judgment.

I. The Underlying Action

Contrary to the facts as stated by the petitioner, this case did not arise simply from an arranged adoption, but from deliberate acts calculated to deprive John Kessel of his son. This conduct included directing an Oregon lawyer not to give John Kessel any notice of proceedings, PX 10, 222, directing a West Virginia lawyer that they must prevent John Kessel from learning of the whereabouts of the child or the adoption until the time for him to assert his rights expired, R. 57, 430, intentionally ignoring a West Virginia injunction preventing placement of the child, PX 17, 241, 430, sending a false affidavit to Canada to enable the adoption to proceed to termination of John Kessel's rights, PX 39, 334; 343, 358, and giving false testimony in a deposition denying knowledge of the whereabouts of the adoption proceedings and child when he knew where it was. Tr. 47, 2254-2256. David Leavitt was intimately working with two West Virginia lawyers with respect to this plan, which included frustrating the West Virginia court proceeding. Tr. 521, 397-398, 400, 247, 210-212, R. 1071, PX 7. The allegations in the complaint included a conspiracy among David Leavitt and the other

defendants which included Brian Conaty, one of the lawyers.[1] One thing is clear from the record of this case, John Kessel did everything legally possible to come forward and assert his rights to his son. Defendants did everything they could to prevent him from doing that. David Leavitt stated in letters to Brian Conaty, "I think it is important that they (John Kessel and his attorneys) be prevented from learning any more than they know already for another month if at all possible." Tr. 4310, PX 57. Defendants' conspiracy was successful and prevented John Kessel from finding out until it was too late. Tr. 370-371, 469-470.

Over a seven year period, John Kessel and Anne Conaty were engaged to be married twice. In 1990, out of this relationship which spanned John Kessel's medical school and residency, a son was conceived in Cabell County, West Virginia. In a preconceived and premeditated plan and scheme, the petitioner David Leavitt sent John Kessel's son to Alberta, Canada to prevent him from exercising his constitutional rights as an unwed father to at least notice and a hearing in a United States court before termination of all of his rights to his son. John Kessel's son is now seven years old and he has never seen or spoken to him.

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[1] Much of the complained of conduct is documented in plaintiff's exhibits which included David Leavitt's file. In that file was evidence of phone conversations and written communication between David Leavitt, Brian Conaty and David Lockwood, Anne Conaty's West Virginia lawyer. The shear volume prevents recitation of all of these facts herein.

In January, 1991, Anne suddenly left town. Petitioner contends that Anne left before contacting David Leavitt. The circumstantial evidence, however, points to the contact occurring before she left West Virginia. Tr. 2041-2042. David Leavitt's case file for Anne Conaty included telephone charges which date back to February and March, 1991, and one which appears to date back to January of that year. Tr. 911, PX 4. David Leavitt admitted the first contact was in March, 1991. Tr. 190-191. This contradicted testimony of the Conaty defendants who claimed that the call came from North Carolina in April. Tr. 1870, 2043-2044. Mr. Leavitt counseled clients to follow this kind of procedure in avoiding birth fathers' attempts to come forward and assert their rights. As he told Mr. Schafferius, "move her around to get to the point where they will have a hell of a time catching up with her," as well as other cloak and daggerish conduct to avoid being served with court orders and such. Tr. 1541-1575, 1986, R. 2986, PX 92. As Mr. Leavitt told one witness, he knew how to get around the law. Tr. 687.

Mr. Leavitt advertises all over the United States, Canada and other countries for adoption and placement of babies. He also was advertising in the West Virginia Bell Atlantic Yellow Pages in 1991 as both an attorney and adoption law center. Tr. 177-178, R. 908, PX 2. His normal practice was to require the adoptive couple to deposit money in his trust account to complete the adoption. In this case, it was over $18,000.00. Tr. 182, 199-200, R. 910, PX 4. Although he advertised in West Virginia, he claimed to have no knowledge of West Virginia law. Tr. 194. And, although he essentially places children through his office, he has no one in his office trained to place

children. Tr. 153-154, 160-163. He received 24 calls from West Virginia on his 800 number in just a few months in 1991. R. 154.

After Anne Conaty left town in January, 1991, she never returned until October, 1991, three months after the baby was born. She did, however, retain her residence in Huntington, West Virginia, and merely took leave of absence from her work. Tr. 195, PX 5. Soon after she left town, John Kessel hired attorneys to intervene on his behalf to assert his legal rights to his son. By May 1, 1991, Cheryl Eifert, John Kessel's lawyer, had already written to Anne's West Virginia lawyer, David Lockwood, asking about the baby's prenatal care and warning that he would take legal action, if necessary, to assert his rights to the child. Tr. 288, PX 8. This was faxed to David Leavitt by defendant, Brian Conaty, on May 21, 1991. Brian Conaty, a West Virginia lawyer, had agreed on behalf of petitioner to keep a close check on the courthouse for lawsuits. Tr. 212, PX 8.

Plaintiff, having no response to his attorney's letters, filed suit on June 3, 1991, asking for his paternity rights. On June 21, 1991, David Lockwood, Anne's West Virginia lawyer, faxed a copy of the summons and petition for his rights to David Leavitt. Tr. 241, PX 16. On June 26, 1991, the Circuit Court of Cabell County issued an injunction prohibiting the adoption placement until after John Kessel's paternity could be established. Tr. 241, 750, PX 17, 80A. This injunction was served by publication before the baby was released to the adoptive couple, and it was served on Anne's brother, Brian Conaty, at Anne's place of residence on June 28, 1991. Tr. 732, PX 73, Tr. 1232, PX 66, 67, R. 1210-1236, Tr. 662, 673-674. The jury found by

special interrogatory that both Anne Conaty and David Leavitt had actual notice of the injunction before the baby was placed for adoption. (Petitioner's Appendix A).

Although petitioner claims that all he did in California was lawful, he personally selected the adoptive couple from Canada. Petitioner admitted that in a private placement the parent placing the child must personally select the adoptive parents according to California law. Tr. 174, 662, 2258. He also admitted that it would be unethical for him to cover up the names and information about the adoptive couple and not tell the natural mother information about the adoptive couple. Tr. 2266. Yet, that is what he did. Tr. 1587-1589. Petitioner also advised an Oregon lawyer not to notify John Kessel of a proposed Oregon adoption. Tr. 222. Consequently, the Oregon adoption was cancelled. Tr. 223-224. He then phoned Canada on a weekend and arranged the adoption with the Canadian couple without a home study for the couple who was going to adopt this baby. Tr. 278, 297-299. Petitioner knew of the lawsuit, and without ever asking a West Virginia lawyer whether service was effective, he advised Anne Conaty to not pay any attention to it. Tr. 391. With all of the knowledge of John Kessel's letters, the court action in West Virginia, the injunction and the rights of a determined father, petitioner forwarded all of the information to Canada and asked that the adoption be expedited. PX 52, 473.

The nexus of petitioner's plan was to transport the baby into a jurisdiction which did not recognize the father's rights. Alberta was ideal because if the baby was in the adoptive couple's home for six months, it was impossible to remove it, even if the father found it and

intervened. Tr. 370-371, 469-470. It was this six month "statute of limitations" which became critical in petitioner's conspiracy. The defendants then set about to frustrate and obstruct any attempt by John Kessel to find out where the adoption proceeding was. Petitioner was so desperate to keep John Kessel from discovering this that he testified in November in his deposition that he did not know whether a baby was born or if adoption proceedings had been initiated. Tr. 470, Dep. 13-14. A month earlier he had written the Canadian lawyer and instructed him "you may wish to finalize the adoption expeditiously!" Tr. 473, PX 52. He wrote to Brian Conaty and instructed Brian, Anne's brother, to prevent John Kessel from learning of the adoption or the baby. Tr. 430, PX 57. After a West Virginia trial judge ordered authorization to produce petitioner's file, he sent it out of the country. Tr. 501, PX 64. Brian Conaty, one of the petitioner's co-conspirators, also testified in a West Virginia court proceeding that he had no knowledge of the birth. Tr. 750, PX 80-B. Six days earlier he had received a fax from petitioner discussing the birth of the baby. Tr. 1192-1196. Throughout all of this, the West Virginia trial court admonished attorneys representing the other defendants that obstruction of justice was a serious offense and that the father had constitutional rights and that John Kessel's rights in West Virginia had been established. R. 2012, PX 97, p. 32; R. 2016, PX 98, p. 10; R. 2014, PX 98 p. 32; R. 2020, PX 101, pp. 9-12. In the meantime petitioner gave legal advice with respect to the West Virginia civil action. PX 45, 363. The West Virginia trial court found other Conaty defendants in contempt of court for failure to give evidence. PX 7, 210; PX 73, 732; PX 78, 732.

Petitioner claims his only contact with West Virginia was a Bell Atlantic yellow page advertisement. But that is not accurate. He engaged in a conspiracy with West Virginia residents to deprive a West Virginia resident of his parental rights. He communicated regularly with the West Virginia co-conspirators and others by phone and facsimile. PX 4-10, 15-16, 19, 23, 38, 41-46, 51-64, 89-90, 103; Tr. 182-241, 272, 280-292, 334, 409-410, 430, 1252, 2325; R. 1071.

II. Post-Judgment Proceedings Regarding The Judgment, Bond, and Petitioner's Appeal

Contrary to petitioner's argument, all of the defendants – including petitioner – sought a stay of the judgment pending ruling of the post-trial motions and/or the defendants' anticipated appeal. Res. App. 1. Respondent moved for the trial court to impose a bond securing the judgment pending ruling on the post-trial motions pending appeal.

On December 22, 1995, the court held a hearing on respondent's motion for bond. At that hearing, the parties discussed alternatives to the defendants posting a bond as security. The Conatys offered to retain all of their assets pending appeal, provide a verified listing of their assets, submit to depositions regarding the nature of their assets, and pledge the assets to satisfy the judgment pending appeal. Pet. App. 10a. The court accepted this proposal in lieu of requiring the posting of a bond.

With respect to respondent, however, all the parties recognized that his situation was different than the Conatys:

> THE COURT: I would think so. Now, let's talk about Mr. Leavitt. I do see Mr. Leavitt in a different category because he has no financial ties directly here to West Virginia.
>
> MR. STOLZE: Well, obviously Mr. Leavitt is in a special category. On the other hand, though, Mr. Leavitt will not be able to post bond in order to provide security in this state worth seven million dollars. That's a lot of money for any individual to come up with. *We would not object to a two million dollar – to providing security in the amount of two million dollars plus interest.*

Res. App. 2 (emphasis added). Respondent did not offer to submit to discovery regarding his assets, did not offer to retain and not dispose or transfer the assets, and did not offer to pledge the assets to the judgment should it be affirmed. Petitioner did not produce any evidence regarding his assets or ability to post bond.[2] In fact, at the December 27, 1995 hearing on the post-trial motions, petitioner's counsel attempted to partially retreat from his previous statement regarding petitioner's willingness and ability to post bond:

> MR. MASTERS: . . . One of the things that is somewhat confusing to me is the last hearing George said that, as I understood what he said, was that they were willing to post a $2,000,000 bond, that's my memory from Mr. Leavitt.

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[2] Petitioner's refusal to produce evidence regarding his assets did not begin at the post-trial stage. Despite a pre-trial court order requiring petitioner to disclose his assets to respondent for use in respondent's punitive damage case, petitioner refused to submit to any discovery regarding his assets.

> MR. STOLZE: No, I asked that bond be set in that matter. I said didn't say he was willing to post it or that he could post it.

Res. App. at 3. Consequently, faced with no evidence of petitioner's assets and no offer of any alternative to posting bond, the trial court entered an order *granting petitioner's motion for stay* conditioned on his posting a seven million-dollar bond. Pet. App. 12a.

Petitioner neither posted the bond, moved for reconsideration of it, nor filed any information (verified or not) regarding his assets. Faced with *no* protection of his judgment, respondent retained counsel in California and Virginia and began proceedings to secure the judgment pending the appeal.

Respondent first filed his judgment against petitioner in the counties in California where petitioner's assets were located. Petitioner then sought vacation of the judgment on personal jurisdiction and/or a *stay of the judgment pending resolution of the West Virginia appeal.* The original trial court judge assigned to the case in California granted the motion for a stay conditioned on petitioners' posting of a two million-dollar bond. Res. App. 4. Following the entry of that order petitioner submitted an affidavit regarding his assets; however, respondent's attempts to get petitioner to submit to discovery regarding his assets were successfully thwarted.

Petitioner did not post the bond. Consequently, respondent began the process of investigating and securing petitioner's assets. In the course of that investigation,

respondent discovered that petitioner had begun the process of transferring his assets out of his name. Respondent then initiated an action in California seeking to overturn the fraudulent transfers. Res. App. 5. Subsequently, petitioner filed an affidavit from a close friend of the trial court judge, and she recused herself from the case. The successor judge, over respondent's objections, reversed the previous judge's ruling and vacated respondent's California judgment. The court also dismissed respondent's fraudulent transfer action. Respondent's appeals of the California rulings remain pending.

Faced with the California court's refusal to provide respondent with any protection for his judgment pending the West Virginia appeal, respondent filed a motion in West Virginia and returned to the West Virginia courts for relief. Following the filing of all of the briefs on the merits, respondent filed a motion to have the Supreme Court of Appeals require the petitioner to post bond in the amount of seven-million dollars or dismiss petitioner's appeal. In response, petitioner questioned the authority of the Supreme Court of Appeals to impose such a requirement. However, prior to the Supreme Court's ruling requiring bond, at no time did petitioner argue that a bond would violate his rights under the United States Constitution. Furthermore, prior to the Supreme Court's ruling requiring bond, other than the conclusory allegation of counsel that petitioner was unable to post a seven million-dollar bond, neither did petitioner provide the West Virginia court with any information regarding the petitioner's assets. On January 16, 1997, the Court granted respondent's motion and entered an order requiring respondent to post the seven-million

dollar bond by January 26, 1997 or face dismissal of his appeal. Pet. App. 15a-16a.

On January 21, 1997, petitioner then filed an "emergency" motion to reconsider the bond order. The motion sought either reconsideration or a stay of the ruling to allow petitioner to present oral argument on both the bond ruling and the merits of the appeal at the oral argument scheduled for January 28, 1997. Respondent then filed a response to the motion and petitioner filed a reply on January 22, 1997. In neither opposition did petitioner provide any documentation or information regarding his assets or ability to post bond. On January 24, 1997, the Court granted the motion to stay the bond order and set the issue of reconsideration for hearing with the hearing on the merits of the appeal scheduled for January 28, 1997. Pet. App. 20a. Oral argument on the merits of the appeal by all parties – including petitioner – occurred as scheduled along with argument on the motion to reconsider bond.

In both his response to the motion to reconsider and at the oral argument on the issue, respondent emphasized that petitioner had presented no evidence of his financial ability or offered alternatives that would allow respondent to establish his ability to post a lesser bond. Notwithstanding these contentions at no time prior to the court's ruling did petitioner present any evidence of his ability to post bond. Instead, petitioner continued in his attempt to convince the court that it did not have the power to order any bond at all.

On February 6, 1997, the court entered an order granting, in part, petitioner's motion regarding bond. Pet.

App. 20a. In the order, the court reduced the required bond to $1,100,000.00, an amount approximating petitioner's share of the joint and severally ordered compensatory verdict. *Id.* Following the entry of the February 6, 1997, order, petitioner again moved for reconsideration. In that motion, petitioner noted that he "appreciate[d]" the order reducing the amount of the bond, but admitted that *his argument had not been "that the amount of the 'appeal bond' was too high, but that [the court] has no authority to require such an 'appeal bond.' "* Notwithstanding this contention, *petitioner,* for the first time presented to a West Virginia court his purported "evidence" of his ability to post the bond by filing a copy of the conclusory declaration he filed in California following the order requiring him to post the two-million dollar bond.[3]

On February 19, 1997, the court denied petitioner's motion for reconsideration. Pet. App. 21a. Petitioner did not post the bond *or any other security.* On March 11, 1997, respondent filed a motion to dismiss petitioners' appeal that concluded:

> Therefore, the defendant having made no offer of security whatsoever, and having posted no bond whatsoever, plaintiff respectfully

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[3] Respondent vigorously contests petitioner's self-serving, unsubstantiated declaration of the value of his assets which include a residence on Rodeo Drive in Beverly Hills, California and other commercial property in Beverly Hills and Los Angeles, California. However, based on these documents, by his own admission, petitioner had the ability to post a bond in the range of $550,000 to $650,000. Notably, he never offered in West Virginia to post even a fraction of this amount or any of the underlying assets.

> moves this Honorable Court to dismiss the appeal of David Keene Leavitt for failure to comply with this Court's order dated February 6, 1997.

Res. App. 7. Petitioner did not respond to this motion. On March 20, 1997, the court granted the motion and dismissed petitioner's appeal. The appeal of the Conaty defendants remains pending with a decision expected after September 1997.

REASONS FOR DENYING THE PETITION

I. This Court's Established Precedent Supports The Constitutional Authority Of A State Court To Require Petitioner To Post Reasonable Security In Order To Prosecute His Appeal

The Courts of West Virginia granted Mr. Leavitt a multi-week jury trial, post-trial review of the awards and numerous opportunities to comply with the rules and orders of the West Virginia appellate system.[4] The dismissal of his appeal following his refusal to comply with the court's orders raises no issue worthy of review by this Court.

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[4] Petitioner's suggestion that the Supreme Court of Appeals had no authority to impose the appeal bond on him should be summarily rejected by this Court. As the highest court in the West Virginia judicial system, its decisions regarding West Virginia law and its own appellate procedure are not subject to review in this Court. Petitioner's argument that the Court did not have the authority to require the bond was rejected three times by the court below.

A. The West Virginia Court's Order Requiring The Petitioner To Post An Appeal Bond Did Not Violate His Right To Due Process And Equal Protection

This Court recognized long ago that due process permits a Court to condition access to the appellate process upon the posting of assets adequate to secure the judgment on appeal:

> Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration.
>
> * * *
>
> Viewing the dismissal of petitioner's appeal in the light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing a supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law.

National Union v. Arnold, 348 U.S. 37, 44-45 (1954). Applying this holding, the *National Union* Court affirmed the dismissal of an appeal by the Washington Supreme Court when the judgment debtor refused to comply with the court's order requiring it to transfer its only assets from California to a Washington receiver. *Id.* Contrary to petitioner's argument, *National Union* is not distinguishable. Like the plaintiff in *National Union*, respondent attempted unsuccessfully to secure the defendant's property in California pending appeal. Following the California courts' refusal to grant them relief both returned to the appellate

court reviewing the judgment for relief. While the relief sought and obtained may differ in kind, both received an order requiring the judgment debtor to secure the judgment as a condition for prosecuting the appeal. Any differences in the manner of effectuating the relief have no constitutional significance.[5]

The validity of *National Union* has withstood the test of time. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court found unconstitutional an Oregon appellate bond requirement that a tenant appealing an adverse ruling post a bond in the amount of double the accrued rent with the entire bond being automatically forfeited should the judgment be affirmed.[6] *Lindsey*, however, made clear that the principles set forth in *National Union v. Arnold* remained good law noting that "a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, [and] to guard a damage award already made . . . " 405 U.S. at 77. Indeed, the *Lindsey* Court explicitly reaffirmed the validity of *National Union*. *See id.* at 78 ("We do not question here reasonable procedural provisions to safeguard litigated property, *cf. National Union* [*supra*]"). Likewise other opinions of this Court recognize the propriety

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[5] Indeed, requiring the posting of a bond or other security is certainly less burdensome than requiring petitioner to transfer the assets to West Virginia.

[6] The flaw with the Oregon statute was that the double-bond requirement was unrelated to actual rent accrued or to specific damage sustained by the landlord and, therefore, was unnecessary to assure the landlord payment of accrued rent. 405 U.S. at 77.

of appellate procedures designed to regulate the appellate process to protect winning litigants against improper actions by losing litigants who attempt to appeal.[7]

In this case, the Supreme Court of Appeals ordered Leavitt to post a bond in an amount of his share of the compensatory verdict. The bond ultimately ordered was only a portion of the judgment against petitioner. Thus, unlike *Lindsey*, the amount of the bond ultimately ordered bears more than a reasonable relationship to respondent's verdict against petitioner, and thus, the bond requirement imposed no penalty on petitioner as a prospective appellant.[8]

Petitioner's argument that the West Virginia bond requirement violates well-established procedural norms is contradicted by the cases he cites. Indeed, even this Court's precedents regarding security requirements establish that other courts have applied similar appellate procedures imposing security or other procedural requirements. The general appeal bond provisions approved in *Lindsey*, along with the procedures approved

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[7] *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (affirming , the Supreme Court affirmed the application of Mississippi's 15% appellate penalty statute imposed on parties who appeal unsuccessfully from money judgments or other categories of judgments whose value may be readily determined).

[8] Even the original order providing for an appeal bond in the amount of the punitive award finds sanction in *Lindsey*. *See* 405 U.S. at 78 (noting that a state has "broad authority" to require appeal bond for judgments providing for double or treble damages "even though posting an appeal bond will be doubly or triply more difficult").

in *National Union* and *Crenshaw* represent examples of "reasonable procedural provisions to safeguard litigated property," pending appeal. *Lindsey, supra.*

Other examples of similar appellate requirements appear in the reported cases.[9] As the court in *Patterson, supra,* noted:

> Legislatures, except where inhibited by Constitutional mandate, have had the power generally to regulate appellate procedure, *including the authority to require the giving of a bond as a condition precedent to the consummation of an appeal.* 4A C.J.S. Appeal & Error 502, p. 208. *In many jurisdictions, statutes have been passed requiring, as a condition precedent to taking or perfecting an appeal, that the appellant, or plaintiff in error, must give a bond, recognizance, or undertaking for payment of the judgment, order or decree.*

371 F. Supp. at 1364-65 (emphasis added). Thus, the security requirement imposed on petitioner does not constitute "a change in ancient procedure . . . which disregards . . . fundamental principles" of due process. *Twining v. New Jersey,* 211 U.S. 78, 101 (1908).

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[9] *See Patterson v. Warner,* 371 F. Supp. 1362 (S.D.W.Va. 1972) (three judge panel approving constitutionality of the bond requirements of former W. Va. Code § 50-15-2 requiring the posting of bond double the amount of the judgment to appeal judgment rendered by Justice of the Peace); *Scott v. Morrison,* 1993 U.S. App. LEXIS 14896 (4th Cir. 1993) (approving constitutionality of Virginia requirement requiring appeal bond for rent which has accrued and may accrue but not to exceed one year's rent).

Indeed, even applying the *Mathews v. Eldridge*, 424 U.S. 319 (1976), test urged by petitioner, the bond requirement does not violate due process. The petitioner's interest in the judgment against him must be balanced against the state's interests in "guard[ing] a damage award already made . . . " *Lindsey, supra.* When the judgment debtor has no assets in the forum state, a requirement of bond or other security is the only way to protect that interest. Moreover, the risk of an erroneous deprivation of petitioner's property is nonexistent as the requirement that security be posted only guarantees that the security posted would be paid should the judgment be affirmed. *National Union*, 348 U.S. at 45.

Finally, this Court's precedents regarding access to the appellate process are not applicable to the facts of this case. Petitioner had access to the appellate process. However, as a condition to that access, he was required to post security.[10] The West Virginia courts' orders described above show the courts' flexibility in balancing the litigants' rights in determining security. As noted above, respondents offered alternatives to the bond that were

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[10] Petitioner's reliance on *BMW of North America v. Gore*, 1997 WL 233910 (U.S. 1997) and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) are misplaced. The *Honda Motor* court struck down a state procedure that forbids punitive damage review by both the trial court and the appellate courts. 512 U.S. at 420-21. In this case, petitioner received a thorough post-judgment review of the punitive damage award by the trial court. As noted below, *infra* pp. 27-28, nothing in *Honda Motor* or in *BMW* requires a court to disregard otherwise constitutional appellate procedures in order to review a punitive damages award.

rejected by petitioner. At all times in West Virginia, petitioner steadfastly refused to agree to any security or even submit to discovery regarding his assets. Given both these facts and this Court's opinions regarding appeal bonds, no violation of petitioner's right of access to the appellate courts has been shown.

B. The West Virginia Court's Order Requiring The Petitioner To Post An Appeal Bond Did Not Violate The Commerce Clause Or The Privileges And Immunities Clause

Petitioner's argument regarding the Commerce Clause and the Privileges and Immunities Clause is entirely based on the incorrect conclusion that he was singled out because he was a nonresident. The facts described above establish that his actions were what resulted in the orders entered against him. Indeed, petitioner continually and consistently rejected the opportunity to provide security to respondent like that provided by the other defendants.

Unlike the other defendants, petitioner steadfastly refused to submit to discovery regarding his assets. While the other defendants submitted to detailed discovery of their assets, petitioner refused both in California and in West Virginia. Indeed, it was only after the entry of the bond orders in those states did petitioner file the unsubstantiated "disclosure." He did not provide respondent with either depositions or the detailed information provided by the Conaty defendants.

Moreover, the Conaty defendants agreed not to dissipate their assets and agreed to have liens placed upon

them pending appeal which provided that the assets would be transferred to respondent should respondent be successful. Petitioner, rather than make such an agreement, fought and continues to fight encumbrances placed on his property by respondent and has transferred assets. The West Virginia Courts concluded that these activities justified greater security than that provided by the Conatys. Had petitioner ever offered to provide the same protection, there would have been no need to seek a bond.

The West Virginia order does not burden commerce, only judgment debtors who refuse to provide security of any sort pending their appeal. Nor does it violate the privileges and immunities clause, as the Constitution provides no privilege to judgment debtors who fraudulently transfer assets and no immunity from state requirements regarding the posting of security pending appeal.

II. Petitioner Had Sufficient Contacts With The Courts Of West Virginia To Support Their Exercise Of Personal Jurisdiction Over Him

Petitioner seeks to continue the strategy he adopted unsuccessfully below. He attempts to present the jurisdictional issue in terms of a single contact – the act of placing a yellow page ad. *In doing so, he continues to ignore the numerous other specific contacts he had with West Virginia in this case.* Respondent never based his claim of jurisdiction over Mr. Leavitt solely on the yellow page ad, even though that would in this circumstance give jurisdiction. The sum of these contacts, all of which were presented to the trial court, led it to conclude that the courts of West

Virginia had personal jurisdiction over petitioner for the injuries he caused to respondent. As will be shown below, this ruling presents no issue worthy of this Court exercising its certiorari jurisdiction.

Petitioner argues that the exercise of personal jurisdiction over him by the West Virginia courts in this case fails to comport with the requirements of the due process clause. In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), this Court set forth the rule that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he not be present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *See also McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

In this case, petitioner's contacts with West Virginia were much more extensive than the placing of a yellow page ad. The documentary record in this case discloses the numerous contacts Leavitt had with West Virginia in the course of directing the scheme to defraud plaintiffs of their son and grandson. Months prior to the birth of the baby, petitioner's own file establishes that he was aware of who the father was, the fact that the father objected to the proposed adoption, the location of the father, the location of Anne Conaty's lawyer in West Virginia, and the fact that Dr. Kessel was contemplating legal action to stop the adoption. It was also clear to petitioner that Anne Conaty was at all times a West Virginia resident.

Petitioner's contacts with West Virginia became more substantial in the latter part of May, 1991, and until February, 1992, as he directed the actions of the Conaty defendants in West Virginia and supervised the frustration of the West Virginia court's injunction against the adoption of respondent's son. In sum, petitioner directly orchestrated a conspiracy or scheme that successfully resulted in the loss of respondent's child. And, contrary to petitioner's argument, there is substantial evidence that the decision to call Mr. Leavitt resulted from the telephone advertisement. Moreover, even assuming that petitioner's retention occurred as he testified, the documentary record discloses the numerous contacts Leavitt had with West Virginia in the course of directing the scheme to defraud plaintiffs of their son and grandson.

When a defendant purposefully avails himself of the privilege of conducting activities within the forum State, he has clear notice that he is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing his connections with the State. *Woodson*, 444 U.S. at 297.

It is also clear in this case that the relationship between the petitioner and the West Virginia forum was such that it was "reasonable . . . to require [him] to defend the particular suit which is brought there." *International Shoe*, 326 U.S. at 317. As this Court has held, implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating that dispute, *see McGee v.*

International Life Ins. Co., 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering the fundamental substantive social policies, *see Kulko, supra*, 436 U.S. at 93, 98.

Applying these factors, it is reasonable to require petitioner to defend this suit in West Virginia. First, West Virginia has a great interest in adjudicating this suit. Two West Virginia residents conceived a baby in the state. The mother of the child then fled the jurisdiction in an unsuccessful effort to deprive the father of custody of his child and the State of jurisdiction over her person. The Circuit Court of Cabell County issued an injunction prohibiting Ms. Conaty from placing the baby up for adoption, but the injunction was ignored with the advice and assistance of petitioner. Given defendants' total disregard for the authority of the West Virginia Courts and for the constitutional rights of one of its citizens, West Virginia had a great interest in the adjudication of this matter.[11]

---

[11] With regard to the other factors listed above, it was more convenient for the plaintiffs and for all of the Conaty defendants to have West Virginia, rather than California, adjudicate this matter. Furthermore, because of the interstate nature of this action, without petitioner's presence in a West Virginia court, the Conatys could have put the major blame for the entire situation on Mr. Leavitt. Likewise, a separate suit brought only against Mr. Leavitt in California would have allowed him to place the major blame on the Conaty family.

Finally, this Court's precedent clearly supports the exercise of jurisdiction over petitioner based on petitioner's advertisements. Advertising within a state for business has long been viewed by this Court to provide sufficient minimum contacts for the assertion of personal jurisdiction. In *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), the Court, in looking for minimum contacts between the defendant and the forum state, looked at whether *"the record disclose[d] solicitation of business in that State either in person or by mail." Id.* at 251 (emphasis added). Likewise, in World-Wide Volkswagen, *supra*, this Court again looked to whether the defendants solicited "business [in the forum state] *either through salespersons or through advertising reasonably calculated to reach the State."* 444 U.S. at 289. (emphasis added).

It is undisputed in this case that Leavitt placed an advertisement in the Huntington, West Virginia telephone directory that ran for a year beginning January, 1991. Petitioner's argument that this advertisement had nothing to do with Leavitt's retention by the Conaty defendants is contradicted by the evidence. Anne Conaty testified that she left Huntington in January, 1991 and contacted petitioner as a result of a newspaper advertisement in April. This testimony, however, is contrary to both Leavitt's testimony and his own records. Leavitt testified that his first contact was March 20, 1991. More significantly, Leavitt's file includes telephone charges which date back to February and March and one which appears to date back to January. In addition, Anne Conaty's conduct beginning as early as January, 1991 follows exactly the type of advice that petitioner customarily gave. She left Huntington with all the "cloak and dagger"

style that he recommended, using friends' credit cards, etc. to avoid being traced. Her actions strongly suggest that she was following Leavitt's advice from the very beginning.

The cases cited by petitioner do not support the grant of certiorari in this case. A review of these cases establishes that they all represent application of specific facts to the established law set forth in *International Shoe* and the cases that followed. While some of the cases petitioner cites support the proposition that jurisdiction could be established based solely on an advertisement, petitioner has cited no case where a court has refused to assert jurisdiction with contacts as extensive as these.

III. This Court Need Not Remand For Reconsideration In Light Of BMW

In a continuing attempt to delay the entry of a final judgment against him, petitioner seeks remand of this case for reconsideration in light of *BMW*. Remand is unnecessary as the award of punitive damages does not violate *BMW*. Moreover, petitioner's appeal, including his appeal of the punitive damage award, was dismissed for failure to comply with the bond order. There is nothing about *BMW* that requires a state court to alter the otherwise constitutional procedures that led to the dismissal of petitioner's appeal.

Petitioner, without any citation or other support argues that his conduct was legal in California. Petitioner has not shown that the conspiracy and fraud claims against him would not be recognized in California. Moreover, while a detailed explanation of the state and federal

laws applicable to the adoption is beyond the available page limitations, respondent's brief to the Supreme Court of Appeals of West Virginia details the violations of law.

More importantly, however, unlike *BMW* which was punished for its actions injuring persons in other states, petitioner was punished for his actions that injured respondent, who was a West Virginia resident at the time of his injury. His actions violated West Virginia law even though some of them occurred in California. Much of the conduct was part of the conspiracy directed by petitioner which was intended to and did cause respondent to lose his son. Nothing in *BMW* requires the conduct that causes harm to occur in the state that renders the judgment.

Next, petitioner argues that *BMW* is violated because petitioner had no notice that his conduct violated West Virginia law. Fraud and conspiracy to commit fraud are common law torts that were part of West Virginia law since its inception. Moreover, at trial petitioner himself admitted that placing the baby with knowledge of the injunction was wrong. While petitioner denied knowledge of the injunction, the jury specifically found otherwise. Indeed, the fact that Leavitt directed Anne Conaty to flee to California is a recognition of his knowledge of the position of the West Virginia courts on the issue.

Leavitt claims that he had no notice that such a large punitive damage award could be awarded and that the amount of the award is too high. Given the nature of petitioner's intentional acts and the loss it caused, a punitive award a little over twice the compensatory award should not have been a surprise. Nor under these circumstances is the amount of the award constitutionally

excessive. *See TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443 (approving West Virginia procedure and verdict which led to $10,000,000 punitive award more than 500 times compensatory award) (1993). Given petitioner's continued insistence that he did nothing wrong, one could argue that the punitive damage award was too low.

Finally, petitioner points to nothing about punitive damages that requires a state court to disregard its appellate procedures in order to review a punitive damages award. Petitioner would have this Court create a constitutional right to appellate review of punitive damages awards that does not exist in many other more serious instances. *See Lindsey*, 405 U.S. 77; *National Union*, at 304 at 41-42. Petitioner had the right to have his punitive damage award reviewed on appeal. He did not have the right to have that review while he transferred assets and otherwise frustrated respondent's right to have his judgment secured pending appeal.

CONCLUSION

David Leavitt is no victim. After years profiting by assisting pregnant women in terminating the constitutional rights of fathers to custody of their children, David Leavitt went too far. Convinced that he could trample the rights of what he referred to as "recreational inseminators," he ignored a court order forbidding the adoption of John Kessel's son and, in violation of numerous laws, both state and federal, sent the baby beyond the reach of John Kessel and the United States courts. Faced with a

seven million-dollar judgment against him, he continued to play fast and loose with the judicial system and John Kessel's rights. Indeed, it was not until he was faced with the dismissal of his appeal did he even attempt to disclose what he alleged his assets to be to the West Virginia courts. In the end, he was not willing to pledge even one penny of his assets to give John Kessel security in the event his judgment was affirmed on appeal. Faced with Leavitt's recalcitrant refusal to comply with West Virginia rules and law, the Supreme Court of Appeals dismissed his appeal. For the reasons noted above, dismissal violated no constitutional right of petitioner.

Likewise, petitioner has failed to make a case for this Court reviewing the personal jurisdiction or punitive damage awards.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARVIN W. MASTERS
Counsel of Record

Of Counsel:
ANTHONY J. MAJESTRO
MASTERS & TAYLOR, L.C.
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
Attorneys for Respondent

APPENDIX

Page

Motion to Stay Proceeding to Enforce Judgement in *Kessel vs. Leavitt, et al.*, No. 92-C-2141 (Circuit Court of Cabell County, West Virginia, December 15, 1995) .....App. 1

Excerpt of transcripts from Bond Hearing in *Kessel vs. Leavitt, et al., No. 92-C-2141* (Circuit Court of Cabell County, West Virginia, Dec. 22, 1995) App. 3

Excerpt from transcript of proceedings, Post-Trial Motions in *Kessel vs. Leavitt, et al.*, No. 92-C-2141 (Circuit Court of Cabell County, West Virginia, Dec. 22, 1995) .....App. 5

Ruling on Submitted Matter, *Kessel vs. Leavitt*, No. SS0006478 (Superior Court of California, County of Los Angeles, Aug. 9, 1996).....App. 8

Complaint to Set Aside Fraudulent Transfer and For Damages in *Kessel vs. Leavitt, et al.*, No. SC043857 (Superior Court for the State of California for the County of Los Angeles, Aug. 26, 1996).....App. 17

Objections to Defendant's Proposed Order and Request for Finding of Fact under CCP §§ 1710.40(c), 632, No. SS006478 (Superior Court for the State of California, For the County of Los Angeles, Nov. 7, 1996) .....App. 27

Plaintiffs/Appellees' Motion to Dismiss Appeal of Defendant Leavitt, No. 961098 (Before the Supreme Court of Appeals of West Virginia, Mar. 11, 1997).....App. 31

IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL and
RAY MILLER KESSEL,

Plaintiffs,

Vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS CONATY, and
BRIAN P. CONATY,

Defendants.

MOTION TO STAY PROCEEDING
TO ENFORCE A JUDGMENT

Come now the defendants Rule 62(i), W.V.R.C.P., and the defendants move the Court to stay enforcement of the judgment against them for a period of 6 months so that the defendants may present a petition for appeal of said judgment to the West Virginia Supreme Court of Appeals.

DEFENDANTS,
By Counsel

/s/ George A. Stolze
GEORGE A. STOLZE
Attorney at Law
845 Fourth Avenue
Suite 300, Morris Building
Huntington, West Virginia 25701

IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL and
RAY MILLER KESSEL,

Plaintiffs,

Vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS CONATY, and
BRIAN P. CONATY,

Defendants.

CERTIFICATE OF SERVICE

I, George A. Stolze, of counsel for the Defendants, do hereby certify that I have served the foregoing Motion to Stay Proceeding to Enforce a Judgment upon the Plaintiffs by depositing a true copy thereof the United States mails, postage pre-paid, in an envelope addressed to Marvin W. Masters, Masters & Taylor, L.C., Fourth Floor Peoples Building, 179 Summers Street, Charleston, West Virginia 25301-2177, counsel of record for the Plaintiffs, this 15th day of December, 1995.

/s/ George A. Stolze
GEORGE A. STOLZE

[p. 2] IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL,
et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
et al.,

Defendants.

BOND HEARING had in the above-styled action before the Honorable O. C. Spaulding, Judge, on Friday, the 22nd day of December, 1995.

APPEARANCES

MR. MARVIN MASTERS and ANTHONY J. MAJESTRO, Attorneys at Law, Charleston, West Virginia, Counsel for the Plaintiffs.

MR. GEORGE STOLZE, Attorney at Law, Huntington, West Virginia, Counsel for the Defendants.

Judith A. Greene,
Official Reporter

* * *

[p. 20] that, Your Honor. We simply don't want to freeze the income flow to Dr. and Mrs. Conaty, because they have to eat.

THE COURT: Developing such documents with those institutions that the Conatys can't come in and take a quick cash payout and head down the road.

MR. STOLZE: I'm sure there's some way to do that with these institutions, contractually.

THE COURT: I would think so. Now, let's talk about Mr. Leavitt. I do see Mr. Leavitt in a different category because he has no financial ties directly here to West Virginia.

MR. STOLZE: Well, obviously Mr. Leavitt is in a special category. On the other hand, though, Mr. Leavitt will not be able to post a bond in order to provide security in this state worth seven million dollars. That's a lot of money for any individual to come up with. We would not object to a two million dollar – to providing security in the amount of two million dollars plus interest.

MR. MAJESTRO: We don't have the financial statements that have been provided to the Court. Has Mr. Leavitt's statement?

MR. STOLZE: No. We don't have a financial

* * *

[p. 1] IN THE CIRCUIT COURT OF CABELL COUNTY
WEST VIRGINIA

JOHN WOODRUFF KESSEL and, RAY MILLER KESSEL, PLAINTIFFS, VS. DAVID KEENE LEAVITT, et al., DEFENDANTS.	CIVIL ACTION NO.: 92-C-2141

POST-TRIAL MOTIONS

Transcript of the proceedings had in the hearing of the above-styled action before the Honorable O. C. Spaulding, Judge, on Wednesday, the 27th day of December, 1995.

APPEARANCES:

MARVIN MASTERS, Esq., and ANTHONY MAJESTRO, Esq., Charleston, West Virginia, Counsel for the Plaintiffs.

GEORGE STOLZE, Esq., Huntington, West Virginia, Counsel for the Defendants.

JO ANN STEWART
CERTIFIED COURT REPORTER
750 FIFTH AVENUE, ROOM 215
HUNTINGTON, WEST VIRGINIA 25701

(304) 526-8605

JO ANN STEWART, CCR

* * *

[p. 107] a bond in this state anyway, because no surety company would write him one. Of course what happens is if the appeal is not granted or the appeal is lost, then the surety company has to pay the judgment or whatever the amount of the bond is, and then they seek to get the money back from Mr. Leavitt who doesn't have enough money to pay them presumably. So that is the only thing I can offer in Mr. Leavitt's behalf, and the Court can exercise his discretion in that regard.

THE COURT: Mr. Masters.

MR. MASTERS: Well, your Honor, we would request and move that the Court require full bond on the part of Mr. Leavitt. One of the things that is somewhat confusing to me is the last hearing George said that, as I understood what he said, was they were willing to post a $2,000,000 bond, that's my memory from Mr. Leavitt.

MR. STOLZE: No, I asked that bond be set in that matter. I said didn't say [sic] he was willing to post it or that he could post it.

MR. MASTERS: That was my understanding. That's the way I recall it.

MR. STOLZE: I don't believe he could post it.

MR. MASTERS: We do not believe that his assets are that limited. And we have no verification here today of

* * *

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: August 9, 1996

HONORABLE:	LORNA PARNELL	JUDGE
	M. BRYANT	DEPUTY SHERIFF
	G. TAPANES	DEPUTY CLERK
	C. SANDERS	ERM

SSOO6478

JOHN WOODRUFF KESSEL

vs.

DAVID KEENE LEAVITT

(Parties and counsel checked if present)

Counsel for Plaintiff:

Counsel for Defendant:

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER

The motion of defendant, David Keene Leavitt, to Vacate Judgment or in the alternative, for Stay of Enforcement of Judgment came on before the Court for hearing on 05-15-96. Based on the evidence presented and the applicable law, the Court now rules as follows.

Defendant David Keene Leavitt ("Leavitt") has filed a motion asking for this Court to either (1) vacate the judgment entered against defendant on the sister-state judgment entered in the Circuit Court of Cabell County, West Virginia in the case of John Woodruff Kessel and Ray Miller Kessel, plaintiffs v. David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty,

and Brian P. Conaty, Defendants, Civil Action No. 92-C-2141 (the "West Virginia action"), or, in the alternative, (2) stay enforcement of the judgment entered on the sister state judgment. Plaintiff, Dr. John Kessel, opposes the motion to vacate, but does not oppose the request for a stay of enforcement of the judgment provided that defendant Leavitt posts an undertaking sufficient to secure payment of the West Virginia judgment.

Following oral argument and extensive briefings, the matter was taken under submission by the Court.

The facts giving rise to the West Virginia action present a rather interesting and unique situation. Those facts, many of which are contested, need not be repeated in great detail here in light of this Court's determination as set forth herein. The procedural background is set forth briefly hereinbelow.

Defendant Leavitt is a resident of California. The other defendants in the West Virginia action are residents of West Virginia. Defendant Leavitt is alleged to have, inter alia, conspired with the other defendants, which conspiracy caused harm to plaintiff. When he was sued by plaintiff in the West Virginia action, defendant Leavitt moved for dismissal for lack of personal jurisdiction over him. Plaintiff opposed that motion, and the issue of personal jurisdiction was litigated in the West Virginia action. The West Virginia court denied defendant's motion to dismiss for lack of personal jurisdiction. Defendant thereafter filed an Answer to the Complaint in the West Virginia action wherein he asserted lack of personal jurisdiction as an affirmative defense. The matter went to trial, and a judgment of seven million dollars plus prejudgment

interest and costs was rendered against defendant Leavitt. The judgment of seven million dollars included five million dollars in punitive damages.

In post-judgment proceedings in the West Virginia action, enforcement of the judgment was stayed as to the West Virginia defendants based upon certain conditions which were satisfactory to the West Virginia court. As to a stay of the judgment with respect to defendant Leavitt, the West Virginia court held:

"It appearing to the Court that no evidence had been offered by said Defendant Leavitt of his financial condition, and although his counsel had made representations as to his approximate worth, no financial statement was provided and no offer was made by said defendant to provide security by bond or otherwise at the hearing on this date. The Court, after considering the evidence in this case and after considering the judgment and the situation of the parties, particularly that the defendant has no assets in the State of West Virginia, that he is not a resident of the State of West Virginia, that he has made no offer in any way to provide security of the judgment, it is ADJUDGED, ORDERED and DECREED that the stay of execution of the judgment in this matter be granted to said defendant DAVID KEENE LEAVITT upon posting with the Circuit Court of Cabell County good and sufficient bond in the amount of Seven Million Dollars to satisfy the Judgment, interest and costs in this proceeding."

No bond was posted by defendant Leavitt in West Virginia, and enforcement of the judgment has therefore not been stayed.

Plaintiff then had his sister state judgment entered here in California. Defendant has now filed his motion to vacate or to stay enforcement of the West Virginia judgment. Defendant contends, inter alia, that the West Virginia court did not have jurisdiction over him, that punitive damages were improperly awarded against him, and that other errors occurred at the trial which warrant reversal of the judgment. Plaintiff, naturally, disputes all of these contentions.

Defendant Leavitt (and the other defendants) have appealed the judgment in the West Virginia action to the West Virginia Supreme Court. On appeal, defendant Leavitt contends, inter alia, that the judgment against him should be vacated since the West Virginia court did not have jurisdiction over him. At the time that this matter was first argued before this Court, defendant Leavitt had filed a petition to appeal the West Virginia judgment, but it was not certain whether there would be any appellate review of the judgment in West Virginia action since, according to information provided to this Court, appellate review is a matter of discretion and not a matter of right in West Virginia in civil actions. However, during the time that this matter has been under submission, the West Virginia Supreme Court has accepted the appeal for review. According to information provided to this Court, the case will be fully considered on appeal and a written opinion will be issued by the West Virginia Supreme Court after additional briefing. All of this is likely to occur before May, 1997.

In light of the fact that the judgment in the West Virginia action, including the question of personal jurisdiction over defendant Leavitt by the West Virginia court, is

being fully reviewed by the West Virginia Supreme Court based upon a full record, this Court considers that the most appropriate action to be taken by it is to grant defendant Leavitt's request for a stay pending the review by the West Virginia Supreme Court.

This Court is authorized to stay enforcement on a judgment while an appeal is pending in a sister state "on such terms and conditions as are just." This may include the requirement that the defendant post an undertaking.

As noted earlier, enforcement of the judgment was ordered stayed by the West Virginia court if defendant Leavitt posted a bond in the amount of the judgment – seven million dollars. That court was familiar with all of the evidence in the case, the judgment, and the situation of the parties. For reasons which are not clear to this Court, defendant Leavitt did not provide evidence of his financial condition to the West Virginia court when the matter of the stay and the bond were being considered by that court (or at any other time that the matter was pending in that court).

At one point in the proceedings before the West Virginia court, counsel for defendant Leavitt represented to that court that, although defendant Leavitt could not post a bond in the amount of seven million dollars, defendant "would not object to providing security in the amount of two million dollars plus interest."

Since two million dollars is the amount of compensatory damages awarded to plaintiff against defendant Leavitt, the Court considers it appropriate to grant defendant Leavitt's request for a stay of enforcement of judgment on

condition that defendant Leavitt provide an undertaking in the amount of two million dollars.

Upon posting of the required undertaking with this Court, enforcement of the judgment in California against defendant Leavitt is stayed until proceedings on appeal in the West Virginia Supreme Court have been concluded, or until further order of this Court.

Dated: August 9, 1996

Lorna Parnell
Judge of the
Superior Court

A true and correct copy of this minute order is sent VIA U.S. Mail this date to the following:

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: ***(Aviso a Acusado)***

DAVID KEENE LEAVITT, an individual, AILEEN LEAVITT, an individual, KERRY LEAVITT, aka KAREN LEAVITT, an individual, and DOES 1 through 10, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(A Ud. le está demandando)

JOHN WOODRUFF KESSEL

You have *30 CALENDAR DAYS* after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Después de que le entreguen esta citación judicial usted tiene un plazo de 30 DIAS CALENDARIOS *para presentar una respuesta escrita a máquina en esta corte.*

Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.

Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.

Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).

CASE NUMBER: *Nuniceor del Caso)*
SC043857

The name and address of the court is: *(El nombre y dirección de la corte es)*

SUPERIOR COURT OF CALIFORNIA
1725 Main Street
Santa Monica, California 90401
WEST DISTRICT

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is: *(El nombre, la dirección y el numero de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)*

DOBRIN & BRONNER
Brian L. Dobrin
Deborah P. Bronner
1999 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
(310) 57[illegible]-1992

DATE: *(Fecha)* AUG 26 1996

Clerk, by /s/ Illegible, Deputy
(Actuario) D.R. Callicoatte *(Delegado)*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

1. [ ] as an individual defendant.
2. [ ] as the person sued under the fictitious name of *(specify)*:
3. [ ] on behalf of *(specify)*:

under: [ ] CCP 416.10 (corporation)
[ ] CCP 416.20 (defunct corporation)
[ ] CCP 416.40 (association or partnership)
[ ] CCP 416.60 (minor)
[ ] CCP 416.70 (conservatee)
[ ] CCP 416.90 (individual)
[ ] other:

4. [ ] by personal delivery on *(date)*:

DOBRIN & BRONNER
BRIAN L. DOBRIN, Esq. SBN: 159552
DEBORAH R. BRONNER SBN: 130306
1999 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
(310) 572-1992

Attorneys for Plaintiff
JOHN WOODRUFF KESSEL

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff, vs. DAVID KEENE LEAVITT, an individual, AILEEN LEAVITT, an individual, KERRY LEAVITT, aka KAREN LEAVITT, an individual, and DOES 1 through 10, inclusive. Defendants	Case No.: COMPLAINT TO SET ASIDE FRAUDULENT TRANSFER AND FOR DAMAGES [CC §3439.07]

Plaintiff alleges:

FIRST CAUSE OF ACTION

(To Set Aside Fraudulent Transfers
Against All Defendants)

1. Plaintiff is informed and believes that defendant David Leavitt and Aileen Leavitt are husband and wife

and Kerry Leavitt, aka Karen Leavitt, is defendant David Leavitt's and defendant Aileen Leavitt's daughter.

2. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as DOES 1 through 10 inclusive, are unknown to plaintiff, who, therefore, sues such defendants by fictitious names. Plaintiff is informed and believes and thereupon alleges that each such DOE-defendant participated in, and is responsible for the acts and conduct alleged herein. Plaintiff is informed and believes and thereupon alleges that each defendant so referred to herein is responsible in some manner for the acts, omissions, occurrences, and damages alleged herein. Plaintiff will amend this Complaint to show such true names and capacities when they have been fully ascertained.

3. From and after December 7, 1995, plaintiff has been the holder of a certain claim against defendant David Keene Leavitt. This claim consists of a judgment rendered in the State of West Virginia in the amount of $6,966.687.47 attached hereto as EXHIBIT A. This judgment was entered in California on March 6, 1996 in the amount of $7,113,916.97, attached hereto as EXHIBIT B.

4. On March 12, 1996, defendant David Leavitt was served with a copy of an Application for Entry of Judgment On Sister State Judgment and Notice of Entry of Judgment on Sister State Judgment. On or about April 12, 1996, defendant David Leavitt brought a motion to vacate the California judgement. On August 9, 1996, Honorable Judge Lorna Parnell denied defendant's motion to vacate the judgment and ordered that enforcement against

defendant David Leavitt be stayed only if defendant David Leavitt posted a bond in the amount of $2,000,000. To date, defendant David Leavitt has not posted any bond and no part of the judgment has been satisfied.

5. Up until April and May of 1996, defendant David Leavitt was the owner, or part owner, of various parcels of real property in Los Angeles and San Bernardino counties. As set forth below, these properties were transferred and/or transmuted to avoid, hinder or defraud plaintiff's attempt to enforce the judgment as aforesaid.

6. Plaintiff is informed and believes that the following property was held as defendant David Leavitt's separate property until on or about April 1, 1996 and is described as follows:

A) 2160 Century Park East, Unit 502 North, Los Angeles, California and also described as Lot 1 of Tract No. 31411, as per Map recorded in Book 830 pages 84 and 85 Book of Maps;

B) 148 Crescent Drive, Beverly Hills, California and also known as Lot 1 of Tract No. 36401 as per Map recorded in Book 935 pages 82 and 83 Book of Maps.

Plaintiff is informed and believes and thereon alleges that on or about April 2, 1996, defendant David Leavitt recorded a transfer of the above described properties via quitclaim deeds, copies of which are attached hereto as EXHIBITS C and D. Defendant David Leavitt transferred the properties described in this paragraph by quitclaim deed to defendant Aileen Leavitt. On June 7, 1996, defendant Aileen Leavitt recorded a deed of trust reflecting that she had obtained a loan in the amount of $165,000.00

secured by the property located at and described above as 148 Crescent Drive, Beverly Hills, California. A copy of the deed of trust is attached hereto as EXHIBIT I.

7. Plaintiff is informed and believes that the following property was owned by defendants David Leavitt and Aileen Leavitt as community property until on or about May 12, 1996:

C) 237 Almont Drive, Beverly Hills California and also described as Lots 265 and 266 of Tract No. 7005 as per Map recorded in Book 72, page 28 of Maps. On or about May 13, 1996, the defendants' interest in this property was transmuted to the undivided sole and separate property of defendants David Leavitt and Aileen Leavitt via quitclaim deed, a copy of which is attached hereto as Exhibit E.

8. Plaintiff is informed and believes that the following property was held by defendants David Leavitt and Aileen Leavitt as tenants in common until on or about April 1, 1996:

D) 2170 Century Park East, #1203, Los Angeles, California and also described as an undivided .1608 interest in Lot 1 of Tract No. 31411 as per map recorded in Book 830, pages 84 and 85 of Book of Maps. Plaintiff is informed and believes and thereon alleges that on or about April 2, 1996, defendants David Leavitt and Aileen Leavitt transferred by quitclaim deed the property described in this paragraph to defendant Kerry Leavitt without consideration. A copy of said quitclaim deed is attached hereto as EXHIBIT F.

9. Plaintiff is informed and believes that the following property was held in part by defendants David Leavitt and Aileen Leavitt as community property until on or about December 21, 1995:

E) 8327 Ridpath Drive, Los Angeles, California, and also described as Lot 15 in Block 63 of Tract 2042 as per Map recorded in Book 21, page 156 of Maps;

F) 8329 Ridpath Drive, Los Angeles, California, and also described as Lot 15 in Block 63 of Tract 2042 as per Map recorded in Book 21, page 156 of Maps.

Plaintiff is informed and believes that defendants David Leavitt and Aileen Leavitt conspired by recording a document entitled Agreement Converting Community Property to Tenancy in Common with the Recorder's Office in Los Angeles County, two weeks after the rendering of the West Virginia judgment, described in Paragraph 3 above, to fraudulently transmute the property identified in this paragraph (9) from community property to the separate property of said defendants. A copy of the said Agreement Converting Community Property to Tenancy in Common is attached hereto as EXHIBIT G.

10. Plaintiff is informed and believes that the following property was held by defendants David Leavitt and Aileen Leavitt as community property until on or about May 12, 1996:

G) Unit 51, Edgewater Shores Condominiums, 184 South Highway 73, Lake Arrowhead, County of San Bernardino, California, also described as Lot 51, Tract 8650 as per Map recorded in Book 117, pages 97-100. This property was transmuted via quitclaim deed on or about

May 13, 1996 into the separate property of defendants David Leavitt and Aileen Leavitt. A copy of the quitclaim deed is attached hereto as EXHIBIT H.

11. Plaintiff is informed and believes and hereon alleges that the aforementioned transfers and tranmutations were made with the actual intent to hinder, delay or defraud creditors, including plaintiff in the collecion of his judgment.

12. The aforementioned transfers were all conveyed as gifts to "insiders" and defendant David Leavitt did not receive reasonably equivalent value in exchange or the property. The aforementioned transfers occurred hortly after defendant David Leavitt was served with Notice of Application for Entry of Sister State Judgment onMarch 12, 1996, or in the case of the Ridpath properties, described in paragraph 9 above, the aforesaid tranmutations were made shortly after a judgment was entered against defendant David Leavitt in West Virginia

13. Plaintiff is informed and believes and hereon alleges that the above-described property was received by defendants Aileen Leavitt and Kerry Leavitt with the knowledge that defendant David Leavitt intendedto hinder, delay, or defraud the collection of plaintiff's aforementioned judgment.

SECOND CAUSE OF ACTION

(Conspiracy Against all Named Defendants

14. Plaintiff refers to and incorporates herein by reference paragraphs 1 though 13 inclusive.

15. As alleged above, defendants knowingly and willfully conspired between themselves to hinder, delay, and defraud plaintiff in the collection of his judgment against defendant David Leavitt.

16. Under this conspiracy, the above-named defendants agreed defendants Aileen, and Kerry Leavitt with respect to 2170 Century Park East, Unit 1203, would take as gifts and without consideration, as their sole and separate property, the aforementioned properties so that plaintiff could not satisfy the judgment awarded against David Leavitt.

17. Also under this conspiracy, defendants David Leavitt and Aileen Leavitt knowingly and willfully transmuted property from community property to separate property to effectively cut plaintiff off from the ability to satisfy his judgment as to half the property that was transferred to defendant Aileen Leavitt.

18. Further, defendant Aileen Leavitt, on June 7, 1996, obtained a loan in the amount of $165,000.00 secured by a Deed of Trust against the property located at and described above as 148 Crescent Drive, Beverly Hills, California. By doing so, Aileen Leavitt knowingly and willfully reduced the value of the property that was previously fraudulently conveyed by defendant David Leavitt and in violation of an agreement reached in open court on May 15, 1996, in the presence of defendants David Leavitt and Aileen Leavitt, wherein defendant David Leavitt, through counsel, agreed not to transfer or secret assets prior to the court's ruling on defendant's Motion to Vacate Judgment. A copy of the Deed of Trust is attached hereto as EXHIBIT I.

19. Defendants Aileen Leavitt, Kerry Leavitt and David Leavitt did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and agreement alleged above.

20. As a proximate result of the wrongful acts alleged herein, plaintiff has been generally damaged in the sum of $2,000,000.00.

21. At all times mentioned herein, defendants Aileen Leavitt and Kerry Leavitt knew of plaintiff's claim against David Leavitt and knew that the claim could be satisfied by the aforementioned real property. Notwithstanding this knowledge, defendants Aileen Leavitt and Kerry Leavitt intentionally, willfully, and maliciously did the things herein alleged to defraud and oppress plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages according to proof.

Wherefore, plaintiff prays judgment as follows:

On the First Cause of Action:

1. That the transfers from defendant David Leavitt to defendants Aileen Leavitt and Kerry Leavitt be set aside and declared void as to the plaintiff herein to the extent necessary to satisfy plaintiff judgment in the sum of $7,113,916.97 plus interest thereon at the rate of 10% per annum from March 6, 1996;

2. That an order pendente lite be granted plaintiff enjoining and restraining defendants Aileen Leavitt and Kerry aka Karen Leavitt and her representatives, attorneys, servants, and agents from selling, transferring, conveying, assigning or otherwise disposing of any of the property transferred;

3. That the judgment herein be declared a lien on the property transferred;

4. That an order be made declaring that defendant holds the same interest he held in each of the properties prior to the wrongful transfers as aforesaid;

5. That defendants Aileen Leavitt and Kerry Leavitt, aka Karen Leavitt, be required to account to plaintiff for all profits and proceeds earned from or taken in exchange for the property described above;

On the Second Cause of Action against defendants, and each of them, as follows:

6. For general damages in the amount of $2,000,000.00;

7. For special damages in the among [sic] according to proof;

8. For punitive damages in an amount according to proof; On all causes of action:

9. For costs of suit herein incurred;

10. For attorneys' fees; and

11. For such other and further relief as the court may deem proper.

Dated: August 22, 1996

LAW OFFICES OF DOBRIN
& BRONNER

By: /s/ Brian L. Dobrin
Brian L. Dobrin
Attorneys for Plaintiff
John Woodruff Kessel

DOBRIN & BRONNER
BRIAN L. DOBRIN, Esq. SBN: 159552
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1999 Avenue of the Stars, Suite 2800
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Attorneys for Plaintiff
JOHN WOODRUFF KESSEL

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff, vs. DAVID KEENE LEAVITT Defendant.	Case No.: SS 006478 OBJECTIONS TO DEFENDANT'S PROPOSED ORDER AND REQUEST FOR FINDING OF FACT UNDER CCP §§1710.40(c), 632 [CRC §391]

TO THE ABOVE-ENTITLED COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiff JOHN WOODRUFF KESSEL hereby objects to defendant's proposed order submitted on or about November 5, 1996, on the grounds that it does not accurately reflect the Court's ruling of November 4, 1996 on defendant's Motion to Vacate Judgment or in the Alternative for Stay of Enforcement.

On November 4, 1996, the Court ruled as follows:

1. California does not have to afford the West Virginia Sister State judgment full faith and credit under the United States Constitution because the West Virginia judgment is not res judicata under the laws of West Virginia because it is pending appeal in West Virginia;

2. The issue of whether the Circuit Court of Cabell County had personal jurisdiction over defendant DAVID KEENE LEAVITT may be reexamined by this Court because the Sister State Judgment is not res judicata in West Virginia;

3. The Circuit Court of Cabell County West Virginia did not have personal jurisdiction over defendant DAVID KEENE LEAVITT;

4. The above rulings are made without prejudice to plaintiff JOHN WOODRUFF KESSEL's right to re-enter the Sister State West Virginia judgment in California upon that judgment having res judicata effect as defined by West Virginia law.

FURTHER, this Court heard defendant's motion *de novo* and, accordingly, it is improper to rule on the motion as if it were a "Motion to Reconsider."

FURTHER, plaintiff JOHN WOODRUFF KESSEL request [sic] this Court under CCP §§1710.40(c) and 632 to issue a finding of fact and law regarding the disputed nature of defendant DAVID KEENE LEAVITT's contacts with West Virginia;

FURTHER, plaintiff JOHN WOODRUFF KESSEL objects to name and address of defendant DAVID KEENE

LEAVITT's law firm printed on the order, which is a violation of L.A.Sup.Ct. Rule 3.0(1).

Dated:
November 6, 1996

LAW OFFICES OF DOBRIN & BRONNER

By /s/ Brian L. Dobrin
BRIAN L. DOBRIN
Attorneys for Plaintiff,
John Woodruff Kessel

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 2800, Los Angeles, California, 90067.

On November 7, 1996, I caused the attached document(s) described as OBJECTIONS TO DEFENDANT'S PROPOSED ORDER AND REQUEST FOR FINDING OF FACT UNDER CCP §§1710.40(c), 632 on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Robert M. Turner, Esq.
Larry R. Feldman, Esq.
Fogel, Feldman, Ostrov, Ringler & Klevins
1620 26th Street, Suite 100 South
Santa Monica, California 90404-4040

(X) (BY MAIL) I caused such envelopes with postage thereon fully prepaid to be placed in the United States Mail at Los Angeles, California. I am an active member of the State Bar of California. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice such correspondence would be deposited with the U.S. Postal Service on the same day with the postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

( ) (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the residence of the addresses.

( ) (BY MESSENGER) By entrusting such envelope to a professional messenger service to effect personal service and delivery.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 7, 1996, at Los Angeles, California.

/s/ Brian L. Dobrin
Brian L. Dobrin

BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 961098

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL,

Plaintiffs,

v.

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS J. CONATY, and
BRIAN P. CONATY,

Defendants.

PLAINTIFFS/APPELLEES' MOTION TO DISMISS APPEAL OF DEFENDANT LEAVITT

(Filed Mar. 11, 1997)

TO THE HONORABLE JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS:

Now come plaintiffs/appellees in the underlying civil action and move the Court to dismiss the appeal of defendant/appellant David Keene Leavitt pursuant to previous order of this Honorable Court entered on February 6, 1997, for the following reasons:

1. Defendant/appellant Leavitt has failed and refused to post bond pursuant to this Court's order of February 6, 1997.

2. Defendant/appellant has never filed with the Circuit Court of Cabell County, West Virginia, or this

Honorable Court any motion or pleading requesting any alternative bond or means of providing security for the judgment granted by the Circuit Court of Cabell County, West Virginia, on December 7, 1995, and which is the subject of this appeal, nor has defendant filed verified documentation of his assets in this Court.

3. Since the briefing and argument concerning the plaintiff/appellee's motion to require reasonable bond and security as a condition to prosecuting the appeal, the California Court has granted defendant Leavitt's demurrer to plaintiff's fraudulent conveyance action (based upon the prior ruling of the California Court vacating plaintiff's judgment allegedly for lack of personal jurisdiction).

4. Further, defendant argued to this Court that plaintiff has security for the judgment in California because plaintiff has filed lis pendens against defendant's property. However, the lis pendens which were based upon the fraudulent transfer action are now in jeopardy and plaintiff has been threatened with a lawsuit in California if he attempts to protect the liens by filing a writ to the California Appellate Court. (See attached letter dated February 26, 1997, from Boyd Lemon, attorney for Leavitt, to Brian Dobrin, attorney for plaintiff, John Kessel.)

Therefore, the defendant having made no offer of security whatsoever, and having posted no bond whatsoever, plaintiff respectfully moves this Honorable Court to dismiss the appeal of David Keene Leavitt for failure to comply with this Court's order dated February 6, 1997.

Respectfully submitted,

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL

By Counsel

/s/ Marvin W. Masters
Marvin W. Masters
Paula L. Wilson
Masters & Taylor, L.C.
181 Summers Street
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ILLEGIBLE, CALIFORNIA [ILLEGIBLE]
TELEPHONE (805) [ILLEGIBLE]
FACSIMILE (805) [ILLEGIBLE]

February 26, 1997

VIA FACSIMILE AND U.S. MAIL

Brian L. Dobrin, Esq.
Dobrin & Bronner
1999 Avenue of the Stars
Suite 2800
Los Angeles, CA 90067-6082

Re: Kessel v. Leavitt

Dear Mr. Dobrin:

I have received your letter of February 26, 1997 regarding *Code of Civil Procedure* Sections 405.35 and 405.39. Although you correctly described some of the provisions in those sections regarding the effectiveness of an order expunging notices of pending action, a Petition for Writ of Mandate in this case would be totally frivolous and in bad faith. As you know, in order to avoid expungement you had the burden of proof to show a likelihood of success on the merits of the fraudulent conveyance action. The Court ordered the fraudulent conveyance action dismissed. Therefore, there is no longer any basis for the existence of a lis pendens unless and until the Court's order of dismissal is reversed on appeal. In other words, once the Court decided to dismiss the fraudulent conveyance action, it was required to expunge the lis pendens.

Your client and his counsel are already liable to the Leavitts for damages caused by wrongful lis pendens, including, but not limited to, loss of rental income due to an inability to repair serious rain and wind damage to one of their buildings and severe emotional distress suffered by the Leavitts as a result of having virtually all of

their assets unavailable to them. You now have the opportunity to stop those damages from continuing. If, however, you file a Petition for Writ of Mandate and cause the lis pendens to continue in effect, the damage to the Leavitts caused by the wrongful lis pendens will continue to occur and will increase.

Please take notice that if you file a Petition for writ of Mandate, which would be a frivolous bad faith attempt to continue to tie up the Leavitts' property, the Leavitts will file an action against your client and his counsel for malicious prosecution and all other appropriate causes of action, and the damages will be very substantial.

I suggest that you do appropriate legal research and also consult with independent counsel to advise you. You and independent counsel should be able to conclude that a Petition for Writ of Mandate would be totally without merit, because the action in which it was filed has been dismissed. You can pursue an appeal of the order of dismissal, but you have no right to a Writ of Mandate to vacate the expungement of the lis pendens, when the action in which it was filed has been dismissed, and therefore there can be no likelihood of success on the merits, unless and until there is a reversal on appeal.

I hope that you realize the seriousness of this matter, both to yourself and your client and do not take the filing of a Petition for Writ of Mandate lightly. You can be

assured that my clients will prosecute appropriate actions against your client and his counsel to their conclusion.

Very truly yours,

/s/ Boyd S. Lemon

BSL/bjr

IN THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

NO. 961098

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL,

Plaintiffs,

v.

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS J. CONATY, and
BRIAN P. CONATY,

Defendants.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for plaintiffs, do hereby certify that a true and exact copy of the foregoing "Plaintiffs/Appellees' Motion to Dismiss appeal of Defendant Leavitt" was served upon:

Lonnie C. Simmons
DiTrapano & Jackson
604 Virginia Street, East
Charleston, West Virginia 25301

by hand delivering same this 11th day of March, 1997.

/s/ Marvin W. Masters
Marvin W. Masters

MOTION FILED
AUG 14 1997

(3)

No. 97-124

In The

Supreme Court of the United States

October Term, 1996

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ACADEMY OF CALIFORNIA ADOPTION LAWYERS IN SUPPORT OF PETITIONER

DAVID H. BAUM
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Attorney for Academy of California Adoption Lawyers

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21PP

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, amicus, the Academy of California Adoption Lawyers ("the Academy"), hereby moves for leave to file the attached brief amicus curiae. Petitioner has granted but respondent has refused to grant consent for the Academy to file a brief amicus curiae in support of the petition.

The Academy is a non-profit association of California attorneys who specialize in the adoption of children, both independently and through licensed adoption agencies. Because of its laws favoring birth parent selection of adopting parents and the openness of its adoption procedures, birth parents and potential adopting parents come to California in great numbers both to place and receive children for adoption. California has more adoptions than any other state, over 6,000 per year (excluding stepparent adoption.)

The Academy believes that it is in a position to bring to the Court's attention relevant matters that could not be brought fully to the court's attention by petitioner, particularly the pernicious and chilling effect upon the practice of law and other professions where advertising alone subjects practitioners to personal liability in distant courts – perhaps, as in this case, to a plaintiff who is not

even a client or patient – without regard to other contacts with or activities in the forum.

The Academy, therefore, respectfully requests leave to file the attached brief amicus curiae.

August 12, 1997

Respectfully submitted,

DAVID H. BAUM
16255 Ventura Blvd., Suite 704
Encino, California 91436-2312
818-501-8355

QUESTIONS PRESENTED

I. Whether advertising in a forum state by a non-resident defendant, in and of itself, having no causal connection with plaintiff's cause of action, is sufficient contact constitutionally to vest the forum with personal jurisdiction over that defendant.

II. Whether communications between a non-resident attorney and his or her forum-resident client pertaining to services rendered outside the forum constitute sufficient contacts constitutionally to vest personal jurisdiction over that attorney in the forum.

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BRIEF AMICUS CURIAE OF THE ACADEMY OF CALIFORNIA ADOPTION LAWYERS IN SUPPORT OF PETITIONER

BRIEF STATEMENT OF THE CASE

Anne Gilmore Conaty, referred to as "Anne", a resident of Huntington, West Virginia, was pregnant out of wedlock by John Woodruff Kessel, referred to as "John". At the end of January, 1991, Anne left West Virginia. In May, Anne decided to place her child for adoption. She knew John was opposed to it.

While Anne and her mother, Eleanor Wolfe Conaty, hereinafter referred to as "Eleanor", were in North Carolina, Eleanor saw and responded to an advertisement for adoption services in "USA Today" by Diane Michelsen, a California adoption attorney. Ms Michelsen referred Eleanor and Anne to petitioner, an adoption attorney in Beverly Hills. Unknown to Anne, petitioner had advertised in the 1991 Huntington, West Virginia, yellow pages and in the national "800" telephone directory. The listings set forth petitioner's name, law office address in California, "800" & "213" telephone numbers, and his specialization in adoptions. There was no causal connection between petitioner's directory listings, any of the events which followed, or with plaintiff's cause of action.

Anne and Eleanor came to Los Angeles about June 1, 1991. Anne gave birth on July 24, 1991. The next day, Anne and her parents met the adopting parents at Cedars-Sinai Medical Center in Los Angeles where Anne personally placed the child with them for adoption. Anne executed a written authorization for them to take the child home to Edmonton and signed guardianship and

adoption documents to be filed in the Alberta Court of the Queen's bench. About two weeks after the birth, John and his lawyers contacted petitioner and demanded information concerning the child. Petitioner, invoking the attorney-client privilege, refused to disclose the information John sought. John located the child during the pendency of the Alberta adoption proceedings, retained counsel to intervene, and unsuccessfully contested the adoption, which was granted. (The child is now, and has at all times since the day after his birth, been in the custody of his adoptive parents.)

John then returned to West Virginia and sued Anne, her parents, her West Virginia-attorney brother, and petitioner for damages. The jury returned verdicts of $2 million in compensatory damages and punitive damages against all defendants, including $5 million against petitioner.

Petitioner objected at the outset to the court's personal jurisdiction on the ground that he lacked sufficient minimum contacts with West Virginia. In response to petitioner's motion John alleged that 1) petitioner had solicited West Virginia business by advertising in the yellow pages, and 2) petitioner's subpoenaed "800" telephone bills reflected several calls to petitioner's number from the West Virginia area code 304. Except for a call from Anne's parents' residence after she had consulted petitioner, John did not specify the identity of other callers or the content or purpose of their calls. It was also not shown whether or how any call from area code 304 derived from petitioner's telephone book listing, or whether any listed call involved petitioner's "doing business" in West Virginia. The Circuit Court of Cabell

County denied Leavitt's motion without explanation. Later, at the trial, the court made it clear that its jurisdiction was based on the telephone book listings.

When John entered his judgment in California under the Sister State Money-Judgments Act, the Los Angeles County Superior Court vacated it, finding that petitioner's contacts with West Virginia were insufficient to support personal jurisdiction in that court.

ARGUMENT

Particularly since this Court, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), upheld a constitutional right of attorneys to advertise their services, members of the Academy (as well as California adoption agencies and other providers of adoption services) often advertise in classified telephone and other directories around the country. The services, however, are rendered primarily in California. Many potential birth or adopting parents come to California from states in which members advertise. Many of them are referred to members of the Academy independent of advertising. Some advertisements generate no responses at all.

In the case at bar, petitioner is a California attorney who advertised his services in the Huntington, West Virginia telephone directory. The client-birth mother was a resident of West Virginia but was referred to petitioner by another California lawyer. She had never seen the petitioner's directory advertisements. Moreover, she left West Virginia before she first contacted the petitioner. The

birth mother gave birth and placed her child for adoption in California with a Canadian adopting couple who had come to Los Angeles to receive the child. Petitioner's telephone directory advertising was his only activity in West Virginia. Nevertheless the Circuit Court of Cabell County held his advertisements sufficient contact to support personal jurisdiction.

Other members of the Academy are similarly situated. They fear that persons, who could be non-clients as in this case, or even persons of whose interest, identity or whereabouts they were unaware at the time their services were rendered, may successfully and unfairly subject them to the jurisdiction of far away courts solely because of advertising and without reference to their other activities within the forum.

Petitioner is the only one of five co-defendants as to whom a jurisdictional question exists. After defendants' petition for appeal was granted, briefs were filed, oral argument heard, and the matter submitted, the Supreme Court of Appeals of West Virginia sidestepped the jurisdictional question altogether by requiring that petitioner post a $1.1 million (originally $7 million) bond, which he could not afford, as a condition of being heard.

Resolving this issue is vital to members of the Academy, and to other lawyers in other specialties throughout the country, who advertise their professional services outside their home states. Attorneys and others are entitled to know whether advertising, in and of itself and with no causal connection with plaintiff's alleged cause of action in a distant forum, can constitutionally subject them to personal jurisdiction.

I. ADVERTISING IN A FORUM STATE BY A NON-RESIDENT DEFENDANT, IN AND OF ITSELF, HAVING NO CAUSAL CONNECTION WITH PLAINTIFF'S CAUSE OF ACTION, IS NOT SUFFICIENT CONTACT CONSTITUTIONALLY TO VEST THE FORUM WITH PERSONAL JURISDICTION OVER THAT DEFENDANT.

In the case at bar, petitioner had never been to West Virginia, had never represented clients or handled an adoption to or from the state, had no "continuous and systematic contacts", and had engaged in no activity there except for yellow pages listings which were in no way connected with his representing Anne or plaintiff's cause of action.

Most modern decisions in this area flow from *International Shoe Co. vs. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Jurisdiction over non-resident defendants falls into two categories:

1) general jurisdiction where the defendant has "continuous and systematic" contacts with the forum, even if the cause of action is unrelated to those contacts, or

2) specific jurisdiction, which involves fewer contacts but requires that there be a "nexus", or causal connection, between those few contacts and the cause of action itself.

See *Federal Insurance Co. vs. Lake Shore, Inc.*, 886 F.2d 654, 660 (4th Cir. 1989).

An analysis of specific and general jurisdiction is found in *Helicopteros Nacionales de Colombia, S.A. vs. Hall*, 466 U.S. 408 (1984). Where a Colombian corporation provided helicopter services in Peru and plaintiffs were survivors of workers killed in a crash there. Suit was brought in Texas, plaintiffs claiming jurisdiction because 1) the contract for the helicopter service in which the crash occurred was negotiated by defendant's chief executive at a meeting in Houston, 2) defendant's pilots were trained in Texas, 3) several helicopters and some spare parts had been purchased in Texas; and 4) defendant received over $5,000,000.00 from bank accounts in Houston. No claim was made that the cause of action was causally connected with defendant's specific Texas contacts.

This Court discussed whether Texas had general jurisdiction by virtue of "continuous and systematic general business contacts sufficient to meet federal due process standards" and found the contacts insufficient. The trip into Texas by the chief executive officer did not constitute "continuous and systematic" contacts. The purchase of helicopters and training of pilots in Texas was insufficient because the cause of action was not related to those transactions. Finally, payment from Texas banks was the unilateral action of a third party, which could not be used to establish a non-resident's contacts with the forum state.

Clearly Helicopteros's contacts with Texas were infinitely greater than this petitioner's contacts with West Virginia.

A number of cases have specifically held that advertising, in and of itself, is insufficient to establish general jurisdiction over a non-resident.

See *Congoleum Corp. vs. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir., 1984):

> "[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert [general] jurisdiction."

Also *Ratliff vs. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir., 1971):

> "When . . . defendant's only activities consist of advertising and employing salesmen to solicit orders, we think that fairness will not permit a state to assume [general] jurisdiction."

In *Circus Circus Hotels, Inc. vs. Superior Court*, 120 Cal. App. 3d 546 (1981), California resident guests of the Circus Circus Hotel in Las Vegas sued in California for property stolen when their hotel room was burglarized. Circus Circus advertised extensively and continuously in California, maintained a toll-free telephone number in California, and received a substantial portion of its business from California customers.

Nonetheless, the Court of appeal held, at page 567:

> "Merely advertising in the forum state together with maintaining an '800' telephone number there confers no general in personam jurisdiction on the forum state to try the culpability of the advertiser's allegedly tortious conduct – occurring elsewhere."

The court went on to note, at page 569, that there was no causal connection, or "nexus" between defendant's advertising and the injury suffered by plaintiff.

Van Pelt vs. Best Workover, Inc., 798 S.W.2d 14, 17 (Tex.Ct.App. 1990), involved a non-resident defendant who had a telephone listing in a Houston phone book. Said the court:

> "In *Wood Manufacturing Company, Inc. vs. Schultz*, (D.Ark. 1985), the Court concluded that a listing in the yellow pages did not make a prima facie showing of personal jurisdiction."

In *Dunham vs. Hunt Midwest Entertainment, Inc.*, 2 Neb.App. 969 (1994), an amusement park's radio and television advertisements and circulation of discount coupons in Nebraska was held to be insufficient contacts.

Drago vs. The Home Insurance Co., 486 So.2d 940, 942 (La.App. 1986), held the fact that a franchisor placed ads in yellow pages on behalf of its franchisees was by itself insufficient to permit exercise of jurisdiction over the franchisor.

Ericson vs. Spore, 618 F.Supp. 1356 (D. Minn, 1985) held that there was no jurisdiction over a Wisconsin bar owner where its only contacts with Minnesota prior to the accident were advertising in a Wisconsin publication which circulated in Minnesota, and there was no assertion that the advertising was connected with the injured party's decision to go to the bar.

In *Reliance Steel Products vs. Watson, et al.*, 675 F.2d 587 (3d Cir., 1981), plaintiff claimed that defendants' advertisement in Martindale-Hubbell, which circulated in

Pennsylvania, was sufficient "contact" to uphold jurisdiction. Not only did the court reject plaintiff's contention, it cited, at page 589, a Pennsylvania Superior Court decision, *Lebkuecher vs. Loquasto,* 255 Pa.Super. 608 (1978), where the court opined:

> "An advertisement seeking business in Missouri, *even had it been in an exclusively Pennsylvania directory* would not, by itself, constitute 'continuous and substantial' business activity." (Emphasis added)

Two Nevada cases, *Munley vs. District Court,* 104 Nev. 492, 762 P.2d 414 (1988), and *Price and Sons vs. District Court,* 108 Nev. 387, 831 P.2d 600 (1992), held that distribution of brochures and advertising flyers throughout Nevada were insufficient contacts.

In his Petition for a Writ of Certiorari, petitioner cites cases purporting to find advertising in and of itself sufficient for jurisdiction. Examination of those cases, however, discloses that far more than the mere appearance of a telephone directory listing was involved and, in each, there was a direct connection, or nexus, between the advertising and plaintiff's cause of action, e.g.

In *Balloon Bouquets, Inc. vs. Balloon Telegram Delivery, Inc.,* 466 N.E.2d 523 (Mass.App. 1984), plaintiff sued for trademark infringement, libel and unfair competition, arising from the out-of-state defendant's advertising. Defendant not only advertised in the forum, it compiled and published a national directory of balloon distributors, and maintained an "800" telephone number in the forum through which, for a fee, it accepted orders for balloons and forwarded them to its subscribers in the

forum. Defendant encouraged subscribers in the forum to display its logo and emblem in their own advertisements. It provided public relations services for subscribers in the forum and offered consulting services and legal assistance. Defendant likewise distributed copies of its quarterly newsletter to balloon delivery dealers in the forum.

In *Parris vs. Garner Commercial Disposal, Inc.*, 253 S.E.2d 29, 34 (N.C. App. 1979), North Carolina plaintiff joined Aetna Life and Casualty Company, Inc., of Hartford, Connecticut, as a defendant in an accident case. Plaintiff sought an injunction alleging that Aetna, as insurer of the defendant, had "a financial interest" in the litigation and was allegedly tampering with the prospective jury by publishing a nationally distributed advertisement urging potential jurors to be conservative in finding liability and assessing damages. In upholding jurisdiction, the court found not only that Aetna was listed in forum telephone directories, but it maintained a toll-free number for forum insureds to call Hartford in event of an accident. Likewise, forum directories indicated general agents of Aetna to contact within North Carolina cities. In addition, Aetna was issuing and extending insurance policies within the forum.

Both *Gregory vs. Grove*, 547 P.2d 381 (Okla., 1976) and *Hull vs. Gamblin*, 241 A.2d 739 (D.C. App. 1968) involved classified directory advertising in Oklahoma and Texas by Washington, D.C. patent search and application firms. In both cases, plaintiffs consulted the D.C. defendants in response to the advertisement and, after much correspondence and communication between the parties and payment of substantial fees by plaintiffs, the patent application was denied. In each case, the court held that

the lengthy communications between the parties and plaintiffs' express response to the advertisement were sufficient contacts to support jurisdiction. Said the *Hull* court, at page 743:

> But for that advertisement, appellee might never have been in communication with appellant.

In the case at bar, petitioner's directory advertising in West Virginia was unrelated to any aspect of plaintiff's cause of action. It could not be said that "but for" the directory listings even one aspect of plaintiff's alleged cause of action would have been affected.

II COMMUNICATIONS BETWEEN A NON-RESIDENT ATTORNEY AND HIS OR HER FORUM-RESIDENT CLIENT PERTAINING TO SERVICES RENDERED OUTSIDE THE FORUM DO NOT CONSTITUTE SUFFICIENT CONTACTS CONSTITUTIONALLY TO VEST PERSONAL JURISDICTION OVER THAT ATTORNEY IN THE FORUM.

A number of cases have held that communications in furtherance of the case by out-of-state counsel handling an out-of-state matter for a forum resident do not constitute minimum contacts for the purposes of personal jurisdiction.

In *Marchant vs. Peoples*, 274 Ark. 33, 623 S.W.2d 523 (1981), a legal malpractice suit was filed in Arkansas against a Texas attorney. Defendant was licensed to practice only in Texas, had no contacts with Arkansas except with plaintiff by telephone or mail, and did not initiate

the contact with plaintiff. (A Mississippi attorney representing plaintiff in a Mississippi action recommended defendant to represent plaintiff in a Texas divorce action.)

The Court concluded, at page 525, that "before us is one isolated contact initiated by an Arkansas resident." The court found that the Texas attorney was hired in Texas to work in Texas, and that he never came to Arkansas and offered no services there. Upon those facts, the court determined that the contacts were insufficient to establish personal jurisdiction.

In *Mayes vs. Leipziger,* 674 F.2d 178 (2d Cir., 1982), a New York plaintiff claimed personal jurisdiction over defendant California attorney because, by virtue of telephone calls and written communications, the California attorney had transacted "business in person" within New York. The court found that defendants never entered New York and that they did not initiate the contact with the New York plaintiff.

In its decision, the court stated that no court has extended the long arm statute to reach a non-domiciliary who never entered New York, who performed services outside New York, and who is alleged to have neglected to perform other services outside of New York. Specifically the court held, at page 185:

> "We do not believe that in these circumstances the New York courts would exercise jurisdiction solely on the basis that the defendants, from California, reported to their New York client and sought the wherewithal (i.e. funds, authority and information) by means of letters and calls to New York to perform their non-New York services."

In *Edmunds vs. Superior Court*, 24 Cal.App. 4th 221 (1994), a California limited partnership retained a Hawaii attorney to represent it in Hawaii litigation. The court held that defendant's actions, in coming to California to represent his California client in a deposition in the Hawaii litigation, in making phone calls and writing letters to and from California, and in accepting payment from the California client, did not establish purposeful availment of the benefits and protections of California law so as to subject the attorney to personal jurisdiction in California.

The court explained California public policy as follows, at page 236:

> "Substantial public policy concerns support our conclusion. Allowing an exercise of California jurisdiction over an out-of-state attorney who represents California clients in an out-of-state action, and who has had the limited degree of contact with California as has Edmunds, would effectively be to penalize out-of-state attorneys by subjecting them to suit here on a highly attenuated theory. Out-of-state attorneys would likely be discouraged from representing California residents in actions in the attorney's home state if malpractice and other actions could readily be pursued in California, based largely on the client's residence here."

In *Shearson Lehman Brothers, Inc. vs. Hughes, Hubbard & Reed*, 902 SW 2d 60 (Tex.Ct.App. 1st Dist. 1995), a New York based investment banking company sued a New York based law firm in Texas for malpractice in connection with offering of Texas limited partnership interests, and large oversale of securities in Texas, necessitating

company rescission of the Texas offering. Defendant had a "national Blue Sky practice" and the work for plaintiff was done from defendant's Los Angeles office.

The court held, at page 65, that defendant law firm was not subject to specific personal jurisdiction in Texas, even though the law firm made two trips to Texas, and communicated by telephone, mail and fax with Texas regulatory agencies, personnel of the partnership of which securities were being offered and the Texas law firm handling the oversale claims against plaintiff.

In *Crea vs. Busby*, 48 Cal.App. 4th 509 (1996) plaintiff brought suit in California against an attorney retained to investigate a possible claim in Oregon. The attorney resided and practiced exclusively in Oregon for 14 years, although he maintained his license to practice law in California. The court held that, notwithstanding communications with the client in California, maintaining a license to practice law in California was insufficient contact to justify the exercise of general jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 97-124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals Of West Virginia

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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1. Respondent "takes exception" with petitioner's statement of facts (Opp. 1), and proceeds to provide the Court with a 14-page recitation of his view of the underlying events in this case. But respondent's rather fanciful story is irrelevant to this Court's consideration of the petition. The relevant facts are not in dispute. Petitioner, an attorney, helped to place Anne Conaty's baby for adoption in California. Respondent, the father of the baby, sued petitioner and members of the Conaty family in West Virginia, where the trial court determined that it had personal jurisdiction over petitioner. The jury awarded respondent $2 million in compensatory damages and $5 million in punitive dam-

ages. And the Supreme Court of Appeals dismissed petitioner's appeal on the sole ground that he failed to post a multimillion-dollar "appeal bond" even though the judgment against petitioner was never stayed and respondent is actively attempting to execute against it.[1]

2. Petitioner demonstrated that the Supreme Court of Appeals' "appeal bond" requirement is irreconcilable with several lines of this Court's constitutional jurisprudence. Pet. 8-24. Respondent casts no doubt on the need for review by this Court of that requirement.

a. The uniform rule in American jurisprudence is that an appellant's failure to post a bond "is no ground for dismissing the appeal." *Hudgins v. Kemp*, 59 U.S. 530, 535 (1856); *see* Pet. 9-10 & n.3 (citing authorities). Respondent contends that "[p]etitioner's argument that the West Virginia bond requirement violates well-established procedural norms is contradicted by the cases he cites." Opp. 17. Respondent does not, however, actually address any of the numerous cases cited by petitioner holding that an appeal cannot be dismissed for failure to post a bond, nor does respondent explain how any of those cases contradict the universally accepted principle that "[f]ailure to file such a

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[1] The West Virginia Supreme Court of Appeals' decision to dismiss petitioner's appeal, after all briefing was completed and oral argument had been held, raises the inference that the court intends to reverse the judgment on the merits. That inference was reinforced recently when the court completed its term without issuing an opinion in the Conatys' appeal, contrary to its normal practice of resolving all cases before the summer recess. If the West Virginia court intended to affirm the judgment in this case, there would be no reason for it to delay issuing its opinion, nor would there have been any reason for the court to dismiss petitioner's appeal.

bond is not grounds for dismissal of the appeal." 5 Am. Jur. 2d *Appellate Review* § 442 (1995).

Respondent relies on a single district court case for the proposition that the filing of a bond securing the judgment may be made the prerequisite to an appeal. Opp. 18 (citing *Patterson v. Warner*, 371 F. Supp. 1362, 1364 (S.D. W. Va. 1972)).[2] Although one would not know it from reading respondent's brief, this Court noted probable jurisdiction in *Patterson* because the validity of the West Virginia appeal bond requirement at issue in that case "appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Patterson v. Warner*, 415 U.S. 303, 303 (1974) (per curiam). The Court did not reach the merits of the constitutional question, however, because an intervening state-court decision deprived it of any continuing importance. *See* Pet. 19 n.8. There is no similar bar to review in this case.

It therefore remains undisputed that the Supreme Court of Appeals, by dismissing petitioner's appeal from a fully executable judgment for failure to post a

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[2] Respondent also cites (Opp. 18 n.9) an unpublished decision in which the Fourth Circuit observed that "a general bond requirement for civil appeals is not unconstitutional." *Scott v. Morrison*, 995 F.2d 1064 (4th Cir. 1993) (Table). The court of appeals was considering Virginia's requirement that an appellant post security for *costs* before prosecuting an appeal. Va. Code § 8.01-676.1.A. As petitioner has previously noted, West Virginia has a similar requirement. Pet. 14-15. Such cost bonds are entirely distinct from a requirement that a litigant post a bond to secure the judgment, which is required only if the appellant seeks to stay execution of the judgment. *See* Va. Code § 8.01-676.1.C ("An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall file an appeal bond").

bond, was a radical departure from long-settled American practice. Accordingly, the familiar three-factor inquiry established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), should be applied to determine whether that deviation was unconstitutional.

With respect to the first *Mathews* factor, respondent does not dispute that petitioner's private interest in having his appeal considered on the merits is tremendous. *See* Opp. 19; Pet. 12.

As to the second *Mathews* factor, respondent contends that "the risk of an erroneous deprivation of petitioner's property is nonexistent as the requirement that security be posted only guarantees that the security posted would be paid should the judgment be affirmed." Opp. 19. Petitioner does not contend, however, that the Supreme Court of Appeals' "appeal bond" requirement creates a risk that he will be erroneously deprived of the amount of the bond. Rather, the imposition of such a requirement as a prerequisite to obtaining appellate review creates an impermissible risk that he will be erroneously deprived of the property that is the subject of the judgment. As this Court has explained, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).[3] That risk is intensified when a state refuses to provide appellate review to a particular class of litigants.

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[3] Respondent states that "nothing in *Honda* . . . requires a court to disregard otherwise constitutional appellate procedures in order to review a punitive damages award." Opp. 19 n.10. That assertion begs the question whether the "appeal bond" requirement is, in fact, "otherwise constitutional." Because it is not, petitioner is entitled to the appellate review of the punitive damages award against him that this Court found constitutionally significant in *Honda*. *See* 512 U.S. at 420-21; Pet. 13.

Respondent places heavy reliance on the third *Mathews* factor, arguing that "the state's interests in guarding a damage award already made" justify the "appeal bond" requirement. Opp. 19 (internal punctuation omitted). Respondent bases this argument on this Court's observation that "reasonable procedural provisions to safeguard litigated property" may be constitutionally permissible. *Lindsey v. Normet*, 405 U.S. 56, 78 (1972).[4] As petitioner has previously explained, however, West Virginia has no legitimate interest in "safeguarding" any property over which it has no jurisdiction. *See* Pet. 17. Respondent does not even attempt to dispute the correctness of this argument.

Respondent's failure to recognize that state courts may act only within their jurisdiction also leads respondent to contend, mistakenly, that this Court's decision in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), compels the conclusion that West Virginia's "appeal bond" requirement is constitutional. Opp. 15-16. In *National Union*, the state trial court had ordered a litigant to transfer certain assets to a receiver in the forum state. The court had jurisdiction over those assets because the litigant was a multi-state association, and the litigant's refusal to comply with the court's lawful order was held to be sufficient reason to dismiss the appeal. Here, by contrast, the courts of West Virginia have no jurisdiction over any of petitioner's assets. No decision of this Court has considered, much less authorized, the dis-

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[4] The *Lindsey* Court emphasized that such procedures must be "uniformly and nondiscriminatorily applied." 405 U.S. at 78. As petitioner apparently is the only litigant in the history of West Virginia jurisprudence to suffer dismissal of his appeal for failure to post a bond to secure an executable judgment, that requirement manifestly has not been met.

missal of an appeal for failing to make assets over which a state court has no jurisdiction available to the prevailing party. Under those circumstances, a state court may not constitutionally attempt to extend its jurisdiction beyond its borders through the use of a bonding requirement or otherwise.

b. Petitioner has previously explained that the Supreme Court of Appeals' "appeal bond" requirement cannot be reconciled with this Court's decision in *Lindsey*. Pet. 15-18. Respondent seizes exclusively on a snippet from *Lindsey* that, as just discussed, is inapposite in these circumstances. *See* Opp. 16. Respondent entirely ignores the *holding* of *Lindsey*, which compels the conclusion that the "appeal bond" requirement is unconstitutional. Moreover, respondent does not even mention, much less distinguish, the numerous post-*Lindsey* decisions in the lower courts invalidating bond requirements on constitutional grounds that conflict with the decision below. *See* Pet. 18-19 n.8.

c. A consistent line of precedent, including this Court's recent decision in *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), squarely holds that the States cannot place financial obstacles in the path of litigants seeking appellate review. *See* Pet. 19-21. Respondent does not even attempt to address any of those decisions. Instead, respondent contends that the "appeal bond" requirement did not violate petitioner's right of access to the courts because "[p]etitioner had access to the appellate process. However, as a condition to that access, he was required to post security." Opp. 19. Respondent makes no effort, however, to explain how this *ipse dixit* can be reconciled with the constitutional principle that "no person can be denied access to [the] courts, either for a trial or an appeal, because he cannot . . . finance a bond." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 955 (1971) (opinion of Black,

J., respecting the denial of certiorari). The Supreme Court of Appeals of West Virginia deprived petitioner of his constitutionally guaranteed right of access to the courts by making his appeal contingent on the posting of a bond the court (and respondent) knew petitioner could not afford.

d. Petitioner, the only out-of-state defendant in this case, was the only party required to post an "appeal bond" as a precondition to having his appeal considered by the Supreme Court of Appeals. Such a differential imposition of procedural requirements violates both the Commerce Clause and the Privileges and Immunities Clause. Pet. 21-23. Respondent observes that the Conaty defendants "submitted to detailed discovery of their assets" and "agreed not to dissipate their assets and agreed to have liens placed upon them pending appeal." Opp. 20-21. As the *quid pro quo* for those agreements, however, the judgment against the Conaty defendants was stayed pending appeal. Petitioner has never sought such a stay, and therefore the comparison respondent seeks to draw is false. In any event, respondent was accorded discovery and has encumbered petitioner's assets to the extent permitted under the laws of the States in which those assets are located.

3. This petition presents a question of personal jurisdiction on which there is a clear conflict of authority. Based on the identical evidence, two state courts reached directly conflicting decisions in this case: The West Virginia court concluded that petitioner's Yellow Pages advertisement was sufficient to create personal jurisdiction in West Virginia, while a California trial court held that the West Virginia courts had no jurisdiction over petitioner as a result of that advertisement.

Pet. 25.[5] These conflicting results are part of a larger pattern of contradictory decisions regarding whether a single advertisement can confer personal jurisdiction. Pet. 26-27 & n.11. Respondent attempts to trivialize the conflict on the ground that the cases cited by petitioner "all represent application of specific facts to the established law." Opp. 26. The law, however, is *not* established as regards the intersection of professional advertising and personal jurisdiction, and "[a]ttorneys and others are entitled to know whether advertising, in and of itself and with no causal connection with plaintiff's cause of action in a distant forum, can constitutionally subject them" to the exercise of personal jurisdiction by the courts of that State. Brief *Amicus Curiae* of the Academy of California Adoption Lawyers in Support of Petitioner 4.

4. Respondent argues that there is no need to remand the punitive damages award for consideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). *See* Opp. 26-28. Respondent entirely ignores the fact that the West Virginia courts have *never* had the opportunity to consider the award under the constitutional standards set forth in *BMW*. Petitioner has demonstrated that there are substantial grounds for reversal or reduction of the punitive damages award against him under *BMW*. Pet. 27-29. Although respondent attempts to argue the merits of the *BMW* issues in his opposition, this Court is not the fo-

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[5] Respondent asserts that he "never based his claim of jurisdiction over Mr. Leavitt solely on the yellow page ad." Opp. 21. Whatever other arguments respondent may have made are immaterial, however, because the West Virginia court found personal jurisdiction based on that advertisement. *See* Tr. 2869 ("THE COURT: . . . [I]t was my decision that was based on the fact that he advertised in the 1991 yellow pages").

rum in which to litigate these issues in the first instance. Rather, petitioner merely seeks a remand to the state courts for due consideration in light of the applicable standards, as this Court has done a number of times since *BMW* was announced. *See* Pet. 29.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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